

Challenges of Multi-State Series and Framework for Judicial Analysis

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I. INTRODUCTION

A variation of the common limited liability company (LLC) represents the newest form of entity enterprise on the business scene today. This is the Series Limited Liability Company (Series LLC).¹ Under a Series LLC, the single LLC may establish and contain within itself separate series or cells. These cells or series are referred to by the Drafting Committee for the Limited Liability Company Protected Series Act² of the National Conference of Commissioners on Uniform State Laws (NCCUSL) as “Protected Series.”³ Each such separate Protected Series is treated as an enterprise separate from each other and from the Series LLC itself. Each Protected Series has associated with it specified members, assets, and obligations, and—due to what have been called “internal liability shields”—per the enacting statutes, if the statutory requirements are met, the obligations of one Protected Series are neither the obligations of any other Protected Series nor of the Series LLC itself. The internal liability shield and the ability to have different associated Members among the various Protected Series are the principal unique distinguishing characteristics of the Series LLC. Although cells have existed in trusts for many years,⁵ and the concept is found in the Statutory Trust Entity Act,⁶ the internal liability protection and potentially separate owners or beneficiaries within a business entity are unique concepts for American jurisprudence and widely used forms of business entities. The result is a single legal entity with owners associated with each Protected Series, assets associated with each Protected Series, and each Protected Series functioning in a manner analogous to a separate legal entity within the Series LLC.

1. Other terms used for the Series LLC include series organization (see Series LLC and Cell Companies, 75 Fed. Reg. 55699-01 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301) and master LLC (see SEC Letter, *infra* Part VI.D; SERIES LIMITED LIABILITY COMPANY (SERIES LLC), CAL. FRANCHISE TAX BOARD, <https://www.ftb.ca.gov/businesses/structures/series-limited-liability-company.shtml>). Series LLC is the term used in this Article.

2. The name of the Uniform Act was previously “Series of Unincorporated Business Entities Act”. However, the Executive Committee of the Uniform Law Commission changed the name to the Limited Liability Company Protected Series Act on January 23, 2016 because the act, if approved by the Commissioners, will only to apply to limited liabilities companies and not other forms of entities.

3. The Draft Series of Unincorporated Business Entities Act for the Sept. 27–28, 2013 NCCUSL Drafting Committee Meeting first used the term “protected series,” when referring to the series (as opposed to the Series LLC) because “(i) usage in the series/asset-partitioning realm requires that the act refer to ‘series’ while (ii) usage elsewhere makes the term confusing when standing alone.” This terminology has continued in the subsequent drafts. *Preface to SERIES OF UNINCORPORATED BUSINESS ENTITIES ACT*, NAT’L CONF. COMM’RS UNIF. STATE LAWS § 102.

4. In the literature, other terms for Protected Series are cells or simply series.

5. See Jeffrey Simpson & Charles J. Lavelle, *Insurance Aspects of the Proposed Series Regulations*, ABA Section of Tax’n., Partnership Comm., LLC and LLP Subcommittee (May 10, 2014) (providing historical background of trusts).

6. UNIF. STATUTORY TR. ENTITY ACT § 401 (NAT’L CONF. COMM’R ON UNIF. STATE LAWS 2009).

II. CHARACTERISTICS OF A SERIES LLC

In the preamble to the Proposed Treasury Regulations⁷ that provide guidance for the federal taxation of Series LLCs, a Series LLC is described as the following:

In general, series LLC statutes provide that a limited liability company may establish separate series. Although series of a series LLC generally are not treated as separate entities for state law purposes and, thus, cannot have members, each series has ‘associated’ with it specified members, assets, rights, obligations, and investment objectives or business purposes. Members’ association with one or more particular series is comparable to direct ownership by the members in such series, in that their rights, duties, and powers with respect to the series are direct and specifically identified. If the conditions enumerated in the relevant statute are satisfied, the debts, liabilities, and obligations of one series generally are enforceable only against the assets of that series and not against assets of other series or of the series LLC.⁸

Delaware defines its series LLC as the following:

A limited liability company agreement [that] establish[es] or provide[s] for the establishment of one or more designated series of members, managers, limited liability company interests or assets. Any such series may have separate rights, powers or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations, and any such series may have a separate business purpose or investment objective.⁹

Many analogize a Series LLC with the separate Protected Series to a parent corporation and its subsidiaries.¹⁰ The analogy may be somewhat accurate and useful in those instances in which there is a single member or the same or substantially same members of the Series LLC each having the same as or similar proportionate association with each Protected Series. Even under those conditions, the analogy is not completely accurate as distributions do not actually flow through the Series LLC as they would in a parent subsidiary structure but generally are made directly to the associated members. Likewise, income, gain, and loss are allocated directly to the associated members of the Protected Series as opposed to the Series LLC itself. Often some of the Series LLC associated members will have varying interests in the various Protected Series and some may not even have an interest in one or more, or even any, of the Protected Series.

7. Series LLCs and Cell Companies, 75 Fed. Reg. § 55699-01 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301).

8. *Id.*

9. DEL. CODE ANN. tit. 6, § 18-215(a) (2016).

10. Michelle Harner et al., *Series LLCs: What Happens When One Series Fails? Key Considerations And Issues*, BUS. L. TODAY 1, 2 (Feb. 2013).

Economically, the Series LLC itself may or may not even be financially “associated” with one or more, or even any, of the Protected Series. Only those members “associated” with each specific Protected Series have an economic interest in such specific Protected Series and perhaps almost have the full control of the operations of the Protected Series.¹¹

Another analogy describes the Series LLC as the legal entity “wrapper” in which the different Protected Series exist with separate rights, powers or duties with respect to specified property or obligations of the Series LLC, different profits and losses associated with such specified property or obligations, potentially different associated members, and may have different business purposes. The legal entity as a “wrapper” is consistent with the concept that the Series LLC contains within itself the Protected Series. With apologies to Forrest Gump, the Series LLC is like a box of chocolates. The Series LLC itself may be seen as the box and each Protected Series is a separate chocolate within the box. Each of the Protected Series have their own flavor and ingredients—the internal shields separate each of the different chocolates and the different associated assets, liabilities, members and purposes, and other unique aspects of each of the Protected Series provide the different flavors.

The concept of a single legal entity having various Protected Series which are each firewalled from the others and from the Series LLC itself at this time also causes some conceptual confusion and raises the specter of nefarious activities and secrecy. This specter of potential abuse has created a concern in many within the legal community. Conceptually, for Delaware Series LLCs that choose to voluntarily identify each Protected Series in the public filings of the Series LLC, there would largely be the same information concerning the Protected Series as that provided for a Delaware corporation.¹² In originally choosing to not include provisions for Series LLCs in the Revised Uniform Limited Liability Company Act (2006), the NCCUSL commissioners cited the conceptual difficulties with Series LLCs as one of the reasons in the Preface, stating: “How can a series be—and expect to be treated as—a separate legal person for liability and other purposes if the series is defined as part of another legal person?”¹³

Intuitively, many feel that a single Series LLC with its various Protected Series is a fertile ground for fraud and nefarious actors. California Senate Bill 323 as introduced in 2012 to adopt the Revised Uniform Limited Liability Company Act included provisions for the creation of Series LLCs (Article 12).¹⁴ These provisions were “dropped from the Bill at the request of the California Secretary of State on the grounds that the series provide ‘additional veils of secrecy to the LLC assets and liabilities,’ which ‘could create an avenue

11. Although not required by the current state statutes, the authors believe that the Series LLC itself should have a degree of supervisory authority over each Protected Series and the ability to “disassociate” the Protected Series from the Series LLC. In the authors’ opinion, Delaware and similar state statutes’ lack of the Series LLC’s express mandatory power to review the books and records of each Protected Series and to disassociate a Protected Series is a statutory flaw that increases the likelihood that Series LLCs can be used for mischief. A concept of certain limited authority and/or responsibility for the board, managers or other controlling parties of the Series LLC over each Protected Series would, in the authors’ opinion, go a long way to minimize the usefulness of Series LLCs for nefarious activities.

12. See DEL. CODE ANN. tit. 8, § 102 (2015); DEL. CODE ANN. tit. 6, §§ 18-201, 18-215(b) (2012).

13. *Preface to REV. UNIF. LTD. LIABILITY CO. ACT* (NAT’L CONF. COMM’RS ON UNIF. STATE LAWS 2006).

14. S. 323, 2011–12 Reg. Sess. (Cal. 2012) (codified at CAL. CORP. CODE tit. 2.6 (2012)).

for an LLC to avoid legitimate responsibilities to third parties and/or members.”¹⁵ Similar concerns were raised in Maine¹⁶ and in Florida,¹⁷ with the result that their statutes presently do not provide for Series LLCs to be created under their laws. A foreign Series LLC qualifying to do business in Maine must provide in its filing a statement that the Series LLC is governed by an agreement that establishes or provides for the establishment of designated series having separate rights, powers, or duties with respect to specified property or obligations of the foreign LLC, or profits and losses associated with specified property or obligation.¹⁸ In addition, the statement must declare whether the debts, liabilities, and obligations incurred, contracted for or otherwise existing with respect to a particular series, if any, are enforceable against the assets of such series only, and not against the assets of the foreign LLC generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign LLC generally or any other series therefore enforceable against the assets of such series.¹⁹ It was the intent of the bar drafting committee to permit one or more Protected Series of a Series LLC formed under the laws of other states to properly qualify to do business in Maine and for the internal liability shields to be honored. Whether this intent is achieved is presently unclear. Interestingly, Florida law provides that the Florida Department of State may require each individual Protected Series of a foreign Series LLC that transacts business in Florida to make a separate application for certificate of authority, and to make such other filings as may be required for purposes of complying with specific statutory requirements as if each Protected Series were a separate foreign limited liability company.²⁰ Does this imply that with adequate disclosure and filings Florida will recognize the internal shields for a foreign Series LLC? Perhaps so, if Florida courts conclude that Florida citizens and businesses that do business with a foreign Series LLC are on notice and adequately protected.

The concept of Series LLCs originates in the protected cell companies and trusts in the insurance world.²¹ Delaware attorneys added this concept to the LLC world in 1996 with the financial markets in mind.²² Mutual funds were then using the cells of Statutory

15. Allan G. Donn et al., *Choice of Entity—2013 Update: Series LLCs*, AM. L. INST. 65, 73 (2013), <http://files.ali-cle.org/files/courbooks/pdf/vcu0222-chapter-05.pdf>.

16. Maine revised its LLC statute with a new Act that took effect July 1, 2011 and decided not to include the series concept. See Kevan Lee Deckelmann et al., *Maine’s New Limited Liability Company Act*, 25 ME. B.J. 181, 185–86 (2010) (“The uncertainties surrounding the series LLC, the fact that the most suitable uses of a series LLC are not common in Maine, and the fact that Delaware has the series LLC available in its LLC Act for those who want a series LLC all lead the Drafting Committee to decide against including the series concept in the New Act.”); see also Christopher McLoon & Margaret Callaghan, *The Dangerous Charm of the Series LLC*, 24 ME. B.J. 226, 226 (2009).

17. Bar committees in Florida and North Carolina considered but decided not to recommend Series LLC legislation. See J. Leigh Griffith & James E. Long, *Series LLCs – December 2013 Update on Recent State Legislative and Taxation Developments*, BLOOMBERG BNA, 5 (Mar. 24, 2014).

18. ME. STAT. tit. 31, § 1622 (2011).

19. *Id.* §§ 1622(2)(I), (J).

20. FLA. STAT. § 605.0902(3) (2014).

21. Jeffrey Simpson & Charles Lavelle, *supra* note 5.

22. Daniel S. Kleinberger & Carter G. Bishop, *The Next Generation: The Revised Uniform Limited Liability Company Act*, 62 BUS. LAW. 515, 541–43 (2007).

Trusts²³ and the greater flexibility with the contractual framework of an LLC was very appealing to mutual fund sponsors and managers. Forming a new legal entity and obtaining the various regulatory approvals such as complying with the Securities and Exchange process for the approval to offer securities for a new mutual fund take long lead times and is quite expensive. The ability to take an existing entity and create a division with “internal liability shields” was a major plus for an ever-growing family of mutual funds focused on specific strategies, markets, and sized entities. A supplement for the entity could be prepared, filed, and processed by the SEC much more quickly than the creation and qualification of a new entity.

Despite the uneasiness felt in various quarters about Series LLCs, there are an ever-increasing number of states and jurisdictions enacting Series LLC statutory provisions and the NCCUSL has reconsidered its stance.²⁴ There is now a NCCUSL Drafting Committee on “Limited Liability Company Protected Series Act” (formally “Series of Unincorporated Business Entities”)²⁵ working on a uniform law, a draft of which underwent its first reading at the July 2014 NCCUSL meeting.²⁶ In this meeting, however, questions continued regarding the need or appropriateness of a series business entity. The Act underwent a second reading in July of 2015 where the concern over the need for a series business entity continued with a particular focus on business entities other than Series LLCs. However, the mere concept of Series LLCs remains controversial within NCCUSL.²⁷ Most recently, the Drafting Committee met in March 2016 to continue the work on a revised draft of the proposed Act as limited to Series LLCs.²⁸ It is unclear as to whether the end product will be a uniform law or a model act.

Even without a uniform law to guide each state’s drafting committees, at this time the following 16 states and other jurisdictions have passed Series LLC legislation permitting the creation of Series LLC pursuant to their state statutes: Alabama,²⁹ Delaware,³⁰ the

23. *See, e.g.*, DEL. CODE ANN. tit. 12, §§ 3801–3826 (2016).

24. *See infra* notes 29–43 and accompanying text for a discussion of states that have enacted Series LLC legislation.

25. The drafting project was originally titled “Series of Unincorporated Business Entities” but following the decision to limit the scope of the draft to LLCs, the title was changed.

26. *See generally* SERIES OF UNINCORPORATED BUS. ENTITIES ACT (NAT’L CONF. COMM’RS ON UNIF. STATE LAWS, draft 2014).

27. *See* LIMITED LIABILITY COMPANY PROTECTED SERIES ACT, UNIF. L. COMM., <http://www.uniformlaws.org/Committee.aspx?title=Limited%20Liability%20Company%20Protected%20Series%20Act> (last visited Jan. 23, 2017) (documenting the revision process of the Act).

28. *See generally* SERIES OF UNINCORPORATED BUS. ENTITIES ACT (NAT’L CONF. COMM’R ON UNIF. STATE LAWS, draft 2016).

29. ALA. CODE § 10A-5A-11.01 (2014).

30. DEL. CODE ANN. tit. 6, § 18-215 (2016).

District of Columbia,³¹ Illinois,³² Indiana,³³ Iowa,³⁴ Kansas,³⁵ Missouri,³⁶ Montana,³⁷ Nevada,³⁸ Oklahoma,³⁹ Puerto Rico,⁴⁰ Tennessee,⁴¹ Texas,⁴² and Utah.⁴³ In addition, as discussed above, Maine does not have a provision permitting the organization of Series LLCs but does specifically provide for the registration of a foreign Series LLC with specific disclosure concerning the debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series.⁴⁴ The Florida LLC statute gives the Florida Department of State the authority to require each individual Protected Series doing business in Florida to register.⁴⁵

To varying degrees, most of the Series LLC statutes have been modeled after, or at least heavily influenced by, the Delaware statute. Delaware, however, does not require a public filing for the creation of the Protected Series. A statement in the certificate of formation that the Series LLC may create one or more Protected Series constitutes the entire mandatory public notice under the Delaware Statute. In contrast, the District of Columbia and Illinois require a separate filing for the organization of each Protected Series, and an option exists for the Protected Series to elect to be treated as a separate legal entity by provisions set forth in its Articles of Organization.⁴⁶ Some states require a filing listing the name of each Protected Series if such Protected Series is to have the benefit of the internal shields.⁴⁷ Most states with Series LLC legislation expressly permit each Protected Series to file suit or be sued in its (the Protected Series) own name.⁴⁸

Beware, however, California, Minnesota, North Dakota, and Wisconsin, which are not included in the listing above because they have “false series” provisions. Each of these states have a provision in their LLC statutes that permits the series concept for LLCs and provides for the segregation of assets, liabilities and, “owners,”⁴⁹ but these statutes do *not*

31. D.C. CODE § 29-802.06 (2013).

32. 805 ILL. COMP. STAT. 180/37-40 (2016).

33. IND. CODE § 23-18.1-1-1 (2017).

34. IOWA CODE ANN. §§ 489.1201–489.1206 (2009).

35. KAN. STAT. § 17-76,143 (2015).

36. MO. ANN. STAT. §§ 347.039, 347.153, 347.186 (2013).

37. MONT. CODE ANN. §§ 35-8-102, 35-8-107, 35-8-108, 35-8-202, 35-8-208, 35-8-304, 35-8-307, 35-8-503, 35-8-803, 35-8-804, 35-8-901, 35-8-902 (2015).

38. NEV. REV. STAT. ANN. §§ 86.1255, 86.161, 86.286, *amended by* S.B. 446, 78th Reg. Sess. (Nev. 2015), 86.291, 86.544 (2015).

39. OKLA. STAT. tit. 18, § 2054.4 (2004).

40. P.R. LAWS ANN. tit. 14, § 3967 (2009).

41. TENN. CODE ANN. § 48-249-309 (2012).

42. TEX. BUS. ORGS. CODE ANN. §§ 101.601, 101.622 (2009).

43. UTAH CODE ANN. § 48-3a-1201 (2016).

44. It was the intent and expectation that the internal liability shields of a foreign Protected Series would be respected. ME. STAT. tit. 31, § 1622 (2011).

45. FLA. STAT. § 605.0902 (2014).

46. D.C. CODE § 29-802.06(h) (2013); 805 ILL COMP. STAT. 180/37-40(b) (2016).

47. *See infra* tbl. 4.

48. *Id.*

49. ME. STAT. tit. 31, § 1623(1)(J) (2011).

provide for the internal liability protection among series or cells.⁵⁰ In the absence of the express creation of internal limited liability shields, the reader should assume such shields are not available in these states. Furthermore, a state's public policy to not honor internal liability shields for Series LLCs created in these jurisdictions may reflect a corresponding public policy choice to not honor internal liability shields of Series LLCs formed in other states and doing business in one of the states listed above. The members may create internal agreements among themselves as to liabilities and assets, but it is perhaps unlikely that third parties will be bound by such agreements unless they know of and consent to such agreements.

III. IS THE ACCEPTANCE OF LIMITED LIABILITY COMPANIES IN THE 1990S A HARBINGER FOR ACCEPTANCE OF SERIES LLCs?

The development of the law with respect to limited liability for LLCs may be instructive in anticipating the development of the law with respect to Series LLCs. LLCs were not recognized until the late 1970s. In 1977, Wyoming passed the first LLC legislation, which slowly started a chain of events that would lead LLCs to become the most popular business entity today.⁵¹ While LLCs took a long time to gain popularity, they are now the dominant form of business activity.⁵²

The LLC movement began in Wyoming with the first legislation passed in 1977.⁵³ Before Wyoming's statute, only a corporation could be used to limit the liability of an entity from all of its owners.⁵⁴ However, the LLC did not, and does not, have the double taxation issue like a corporation because a multi-owner LLC could be structured under the pre-check the box federal tax law to be treated as a partnership. Now, with "check the box" rules under Treasury Regulations Section 301.7010-3,⁵⁵ the domestic LLC is automatically taxed as a partnership unless the LLC affirmatively elects to be taxed as a corporation.⁵⁶ The LLC combined the best features of a corporation (its limited liability shield for all owners) and the best features of partnerships (its flow-through tax treatment, special allocations and profits interests) into one single business organization.⁵⁷

The use of LLCs started to slowly grow in 1980 after the IRS found that a Wyoming LLC could be taxed as a partnership.⁵⁸ In 1982, Florida enacted LLC legislation.⁵⁹ Notwithstanding, the IRS still disliked these entities and proposed regulations to tax any

50. CAL. CORP. CODE § 17703.04 (2014); MINN. STAT. ANN. § 322B.03, subd. 44 (2015) ; N.D. CENT. CODE § 10-32-02.55 (2013) (*repealed by* 65th Leg. Assemb., 2017 Reg. Sess. (N.D. 2017)); WIS. STAT. § 183.0504 (2016).

51. See Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1461 (1998) (discussing historical background of LLC legislation).

52. *Id.* at 1476–78.

53. *Id.* at 1463–78.

54. *Id.* at 1485.

55. Treas. Reg. § 301.7701-3(a) (2006).

56. See generally John O. Everett et al., *Converting a C Corporation into an LLC: Qualifying the Tax Costs and Benefits*, 113 J. TAX'N 94 (2010) (describing the tax costs and benefits of converting to an LLC).

57. *Id.* at 94–95.

58. IRS Priv. Ltr. Rul. 81-06-082 (Nov. 18, 1980).

59. Hamill, *supra* note 51, at 1469.

limited liability organization as a corporation under state or local law.⁶⁰ Shortly after, in 1983, the IRS withdrew these proposed regulations and began to allow limited liability for LLCs that were taxable as partnerships.⁶¹ In 1988, the IRS issued Revenue Ruling 88-76, which stated that Wyoming LLCs would be taxed as partnerships, even though they had limited liability.⁶² After this Revenue Ruling was released, other states began enacting legislation.⁶³ In 1990, two states passed legislation.⁶⁴ In 1991, four more states passed legislation.⁶⁵ In 1992, ten more states passed legislation.⁶⁶ In 1993, 18 additional states passed legislation, bringing the total to 36 states with LLC legislation.⁶⁷

By the end of 1996, after the IRS promulgated the “check the box” regulation, all 50 states had enacted LLC legislation.⁶⁸ In this same year, the NCCUSL belatedly promulgated the Uniform Limited Liability Company Act (ULLCA), which provided a template for a uniform organization and operations of LLCs and provided limited liability and taxation as a partnership.⁶⁹ However, the NCCUSL arrived to the party late and, to date, only fifteen jurisdictions have enacted substantive versions of the ULLCA.⁷⁰ Notwithstanding, LLCs quickly became the most popular choice of business entity and that remains true today.

It took almost 20 years before all 50 states had adopted some type of LLC legislation.⁷¹ A similar but somewhat slower pattern of growth could occur with Series LLCs as well. Delaware first enacted its Series LLC statute in 1996.⁷² As described earlier, a dozen states and two other jurisdictions, D.C. and Puerto Rico, have passed Series LLC legislation.⁷³ The more states that pass Series LLC legislation, the safer it will be for these entities to operate in other jurisdictions because of growing expertise in dealing with Series LLCs and also more likely clearer state public policy that internal liability shields are effective. Furthermore, the growing acceptance of Series LLCs in more states will provide more opportunities for courts to hear cases regarding the internal liability shield of the Series LLCs in the context of the development of policy with respect to such internal limited liability shields. This will provide greater legal certainty, and will allow business owners to feel safer operating a Series LLC in foreign states. Additionally, growing acceptance of Series LLC could provide clearer guidance as to the internal liability shield risks of operating in states without such legislation. Also, the popularity of Series LLCs may further

60. 45 Fed. Reg. 75, 709-01 (Nov. 17, 1980) (codified at 26 C.F.R. pt. 301).

61. IRS Announcement 83-4, 1983-2 I.R.B.30.

62. Hamill, *supra* note 51, at 1469–70.

63. *Id.* at 1470.

64. *Id.*

65. *Id.* at 1474.

66. *Id.* at 1475.

67. Hamill, *supra* note 51, at 1476.

68. *Id.* at 1460.

69. *Id.* at 1472.

70. *Legislative Enactment Status of ULLCA*, UNIFORM LAW COMM’N, [http://www.uniformlaws.org/LegislativeMap.aspx?title=Limited%20Liability%20Company%20\(2006\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/LegislativeMap.aspx?title=Limited%20Liability%20Company%20(2006)%20(Last%20Amended%202013)) (last visited Jan. 23, 2017).

71. Hamill, *supra* note 51, at 1460.

72. DEL. CODE ANN. tit. 6, § 18-215(a) (2016).

73. D.C. CODE § 29-802.06 (2016); P.R. LAWS ANN. 14 § 3967 (2009).

increase when the IRS finalizes the regulations that further clarify the various taxes applicable to the Series LLCs. Finally, passage or adoption of a model Series LLC law or a uniform law by the NCCUSL could also provide helpful clarity. All of these factors combined may help stimulate the growth of this new entity and make Series LLCs a popular and mainstream business entity, particularly in the context of affiliated groups and regulated industries.

IV. CURRENT POPULARITY OF SERIES LLCs

Even a few years ago, various articles and web bulletins postulated that many tens of thousands of Series LLCs had been formed.⁷⁴ This appears to have been overly optimistic or exaggerated, although it now appears there are at least tens of thousands of Series LLCs and Protected Series that have in fact been created. There is a large amount of organizational activity given the number of states with Series LLC statutes. As indicated below, many Secretary of State offices, even in states that have Series LLC enabling legislation, do not differentiate filings for Series LLCs versus regular LLCs.⁷⁵ An informal poll of the Secretaries of State and other appropriate offices of the jurisdictions that have passed Series LLC enabling legislation was undertaken in February and March of 2016 by one of the authors to update the information the author similarly obtained in November of 2013. At this time, updated information has been received from Alabama, Delaware, D.C., Illinois, Iowa, Tennessee, Texas and Utah through the end of 2015 and Delaware through 2014. If not updated, the 2013 responses are used and noted in the table below:

74. *See generally* HOW TO INCORPORATE A SMALL BUSINESS, LLC-MADE-EASY, <http://llc-made-easy.com/how-to-incorporate-a-small-business.html> (last visited Mar. 6, 2017).

75. For example, Texas does not require different filings for the organization of a Series LLC versus an LLC. *Formation of Texas Entities FAQs*, TEX. SEC'Y STATE, <http://www.sos.state.tx.us/corp/formationfaqs.shtml#LLC> (last visited Feb. 1, 2017).

Table 1
Series LLC Formation

State	Series LLC Formed in State	Series LLC Formed in State in 2015 or Year Indicated	Foreign Series LLC Qualified to do business in State	Number of Protected Series formed in State
AL ⁷⁶	1001	1001	Unknown	Unknown
DE	7283 ⁷⁷	820	Unknown	Unknown
DC ^{78 79}	8 ⁸⁰	3	Unknown	24
IL ⁸¹	9076 (2015)	2025 ⁸²	562 (2014)	26,875 (2015)
IA ⁸³	Unknown	Unknown	Unknown	Unknown
KS	91	21	Unknown	Unknown
MO	2	Started in 2013	1	Unknown
MT	0	Started 10/2013	0	Unknown
NV (2013) ⁸⁴	17,920 (2013)	1935 (2013)	124 (2013)	Unknown
OK ⁸⁵	Unknown	Unknown	Unknown	Unknown

76. The Alabama Secretary of State Office's website will permit a user to search Series LLCs. The 1001 number is very surprising and may indicate that many self-help business people organizing their LLC and using Alabama's form check the Series box without understanding what it means and without intent to form actual Protected Series. According to the Alabama Secretary of State's records, 11 Series LLCs were dissolved.

77. Per email from Delaware Secretary of State to authors (Mar. 16, 2016) (on file with authors).

78. Per communication with the Department of Consumer and Regulatory Affairs for the District of Columbia in February 2016, officials believe that hundreds of LLCs have been formed that checked the box to be classified as a Series LLC. However, their records only indicate eight have filed actual designations for Protected Series. They estimate that each Series LLC that has filed designations average three Protected Series.

79. In February 2016, the Department of Consumer and Regulatory Affairs for the District of Columbia indicated to the staff of one of the authors that it did not distinguish between a foreign Series LLC and a regular foreign LLC. The registration requirements are the same. Therefore, the number of foreign Series LLCs and/or Protected Series doing business in D.C. is unknown.

80. In February 2016, the Department of Consumer and Regulatory Affairs for the District of Columbia estimated that hundreds of LLCs had checked the box to be Series LLCs. However, as indicated in the table, very few have actually filed designations for Protected Series.

81. See generally Allan G. Donn et al., *Limited Liability Entities 2016 Update: Series LLCs*, ALI CLE, Mar. 18, 2016.

82. Illinois reported on the number of active Series LLCs at the end of each year. The 2025 is net additional Series LLCs that were formed and active at the end of 2015.

83. In February of 2016, a representative of the Iowa Secretary of State indicated that they know there is legislation permitting Series LLCs. Nevertheless, they are currently not accepting Series LLC filings per se, but they do recognize Series LLCs. Apparently, documentation forming a Series LLC in Iowa is filed and processed just as a regular LLC. The representative suggested that a Series LLC could file an application of authority and then have the option of choosing to list all names of the Protected Series or take out fictitious names and file Protected Series as d/b/a. They are not tracking the number of filings.

84. Per email from Nevada Secretary of State to authors (April 24, 2015) (on file with authors), 2029 Series LLCs were formed in Nevada in 2014 and 31 foreign Series LLC qualified to do business in Nevada that year.

85. As of February 2016, the Oklahoma Secretary of State Office does not currently differentiate between Series LLCs and regular LLCs. Therefore, no Series data is available.

PR ⁸⁶	Unknown	Unknown	Unknown	Unknown
TN	1585	690	Unknown	Unknown
TX ⁸⁷	1145	336	138 ⁸⁸	Unknown
UT ⁸⁹	954	160	233	Unknown

By the end of 2015, it appears that over 38,000 Series LLCs had been formed with an unknown number of protected series for each.⁹⁰ It appears that the total number materially increases each year. Illinois, which requires filings for each Series and Protected Series, shows the progressive popularity of Series LLCs. According to the Illinois Secretary of State, Illinois had 6310 active Series at the end of 2012, 6443 at the end of 2013, 7051 at the end of 2014, and 9076 at the end of 2015 (a 28.7% increase in 2015 over 2014).⁹¹ The number of active Protected Series in Illinois was 16,971 at the end of 2012, 19,963 at the end of 2013, 23,818 at the end of 2014, and 26,875 at the end of 2015 (a 12.8% increase in 2015 over 2014).⁹² In three years the number of Illinois active Series LLCs increased by 2766 (a 30.5% increase) and the number of Protected Series increased by 9904 (a 36.9% increase). Perhaps more surprising is Tennessee's experience.

Table 2
Tennessee and Texas Series LLCs (Domestic and Foreign) Based on Year of Filing*⁹³

Year	Number	
	Tennessee	Texas
1994–2007	14	116**
2009	4	28
2010	21	42
2011	33	48
2012	127	111
2013	235	285

86. As of February 2016, Puerto Rico does not differentiate between Series LLCs and regular LLCs. The only way to tell if an LLC is a Series LLC is to open up the Certificate of Organization of individual LLCs and see if they designate themselves as Series LLCs.

87. The Texas Secretary of State does not track series LLCs. A computer search by the Texas Secretary of State for Series in the name of the LLC was commissioned by one of the authors, and the information that was uncovered is presented. There is no assurance all of those are actually Series LLCs.

88. Foreign Series LLCs in Texas register using Form 313. The information is from the office of the Texas Secretary of State as of March 16, 2016.

89. In a February 2016 communication, a representative of the Utah Secretary of State's Office provided the information set forth herein. There were 127 foreign LLCs qualified to do business in Utah in 2015. They have no procedures to track Protected Series at this time.

90. While this many or more Series LLCs appear to have been formed, as noted, a significant number are likely to be as a result of business people using Secretary of State standard forms and checking the Series box without understanding what it means and with no intent to actually form Protected Series.

91. See generally Donn et al., *supra* note 81.

92. *Id.*

93. Organization data from email from the Tennessee Secretary of State's Office on March 15, 2016 (on file with authors) to one of the authors and the Texas Secretary of State computer search commissioned by one of the authors with information through March 16, 2016.

2014	454	310
2015	690	340

*Note: An LLC that was formed in an earlier year that was converted into a Series LLC is shown as organized in the year the original LLC was formed. It is assumed that the Series LLCs that are shown as organized prior to Tennessee's or Texas's statute reflect regular LLCs that were subsequently converted into Series LLCs.

** 89 of these were foreign Series LLCs qualifying to do business in Texas.

What was very surprising to the authors was the fact that, in Tennessee in 2015, only 171 limited partnerships were formed and 122 foreign limited partnerships were qualified to do business in Tennessee for the first time.⁹⁴ This indicates 2.35 Series LLCs for every one limited partnership that was formed or qualified to do business in Tennessee. This relative level of activity was totally unexpected, and to some extent, may reflect business people checking a box on the Secretary of State's forms to be a Series LLC without understanding what it means, with the reality being that only a fraction of the Series LLCs will ever have a Protected Series. Clearly, Series LLCs are popular and being heavily used in Illinois and rapidly growing in Tennessee. Since Tennessee does not require the identification of each Protected Series on public record, it is unknown how many of the Series LLCs in Tennessee have Protected Series or the number of Protected Series that have been formed.

It is surprising that Texas does not have more Series LLCs. It may be because of Texas's taxation of the Series LLC as a single tax reporting entity with the creation of taxing nexus for all Protected Series and a joint and several liability for all Protected Series for the tax incurred by the Series LLC itself and each other Protected Series.

The outstanding number of Series LLCs formed in Nevada is undoubtedly misleading (as it would be in D.C. if they kept score since they believe hundreds of Series LLCs have been formed, but only eight have properly formed Protected Series). The Nevada Secretary of State's form for the organization of LLCs has a box to check if the LLC is a Series LLC.⁹⁵ It may well be that a significant percentage of the Nevada LLCs are Series LLCs due to businessmen forming their own LLCs, using the Secretary of State form, and checking a box for which they have no understanding and in fact have no intention of forming Protected Series.

The concept of the Series LLC is evolving as attorneys and their clients grapple with the practical problems. The situation is similar to that which existed in the early days of the LLC when only relatively few states had passed LLC legislation. The common issues that are grappled with include: (i) how are Series LLCs and the Protected Series taxed, (ii) what U.C.C. filings are required to perfect a security interest, (iii) can a Protected Series seek bankruptcy protection,⁹⁶ and, most importantly, (iv) will the internal liability shields be honored in the states other than the state of organization?

94. Email from Tennessee Secretary of State's Office to authors (on file with authors).

95. NEV. SEC'Y STATE, *Articles of Organization Limited-Liability Company* (Oct. 2015), <http://nvsos.gov/sos/home/showdocument?id=1004>.

96. The early LLCs were clearly separate legal entities. They did not have the legal entity bankruptcy issue in determining whether they were a person as that facing the Protected Series that possess many of the attributes of a separate legal entity but are not actually legal entities.

V. TAX TREATMENT OF SERIES LLCs

The basic federal income tax treatment of Series LLCs and Protected Series is believed to have been largely resolved, although the guidance is in the form of Proposed Treasury Regulations.⁹⁷ Essentially, the Series LLC itself will be considered to be a tax reporting entity only with respect to any assets, liabilities, and business activity undertaken by the Series LLC itself (as opposed to the activities of the Protected Series with an associated member other than the Series LLC). Under the Proposed Treasury Regulations, for federal income tax purposes, (i) each Protected Series with multiple associated members will be considered to be an income tax reporting entity with respect to the assets, obligations, and activities associated with the Protected Series, and (ii) each member associated with the Protected Series will be considered to be an owner of such Protected Series. The normal federal tax entity classification rules are applicable. The default classification applicable to multi-member Series LLC and each Protected Series that has two or more associated members is that of a partnership. A single member Series LLC and each Protected Series that only has one associated member will be disregarded for federal income tax purposes. However, the Series LLC can elect for itself to be treated as an association taxable as a corporation while each of its Protected Series has its own classification. Each Protected Series may choose to elect to be treated as an association taxable as a corporation while other Protected Series and/or the Series LLC itself are taxable as partnerships or if another Protected Series has a single associated member, a disregarded entity.

The employment tax treatment of Series LLCs and Protected Series is not actually known. The IRS requested comments with respect to the employment tax treatment of Series LLCs.⁹⁸ The American Bar Association Tax Section, in a joint task force of the Partnership Committee's Subcommittee on LLCs and LLPs and the State and Local Tax Committee, polled the 50 states, D.C., and Puerto Rico concerning the state taxation of Series LLCs. At that time, all of the states that provided an affirmative position followed the federal income tax treatment except Texas, which treated the Series LLC and each of the Protected Series as a single tax entity.⁹⁹

97. Reliance on a proposed Treasury Regulation is considered to be protected as a safe harbor against future Treasury enforcement. See Mitchell Rogovin & Donald Korb, *The Four R's Revisited: Regulations, Rulings, Reliance and Retroactivity in the 21st Century: A View from Within*, 87 TAXES—TAX MAG. 22 (Aug. 2009) (explaining that "taxpayers generally may not rely on proposed regulations for planning purposes, except if there are no applicable final or temporary regulations in force and there is an express statement in the proposed regulations that taxpayers may rely on them currently."). This proposed Treasury Regulation states it will be effective when finalized and provides for a grandfathering of certain Series LLCs that are treating the Series LLC and all of its linked Protected Series as a single tax reporting entity.

98. Series LLCs and Cell Companies, 75 Fed. Reg. 55699-01 (proposed Sept. 14, 2010) (to be codified at 26 C.F.R. pt. 301).

99. The collateral consequence of this is a failure of the internal liability shields for Texas taxes (perhaps for all Series LLCs with Protected Series doing business in Texas) and perhaps, for Texas Series LLCs, taxes of other states. Potentially, the activities of one Protected Series may generate tax nexus for the other Protected Series if Texas law were to be applied by another state. This makes a Texas Series LLC even more difficult to use in multi-state applications than those formed under the statutes of other states.

As a practical matter, the general income tax rule (outside of Texas) is to follow the IRS proposed regulations even when the state does not have an official position. Therefore, for federal income tax purposes and most state income tax purposes, the tax treatment is generally known with the exception of employment tax. With respect to other state taxes, there are variations.¹⁰⁰

VI. U.C.C. ARTICLE 9 AND LENDERS' CONCERNS

The interplay between Series LLCs and U.C.C. Article 9 is presently fraught with risk and uncertainty. Many Series LLC acts permit assets associated with a given Protected Series to be held in a number of different ways.¹⁰¹ For example, the Delaware LLC Act permits holding such assets either in the name of the Series LLC, in the name of the Protected Series, in the name of a nominee, or "otherwise."¹⁰² The option selected helps determine who, in fact, is the "debtor" within the meaning of U.C.C. Section 9-102(a)(28).¹⁰³ One should remember that, despite language in the state of organization (most now expressly provide the Protected Series can sue or be sued), it is uncertain whether Protected Series are even viewed as the equivalent of legal entities or a person with the power to sue and be sued in a majority of the jurisdictions (i.e., those which have not passed Series LLC enabling legislation) at this time.

Under the Texas LLC Act, for example, by statute, a Protected Series is not identified as a separate domestic entity or organization, although a Protected Series does have the ability to sue or be sued.¹⁰⁴ Statutes in Alabama, Delaware, Montana, Nevada, Oklahoma, Puerto Rico, and Tennessee¹⁰⁵ are not as explicit but contain the concept of Protected Series as something other than a separate legal entity. Creditors should be aware that there is an argument that a Protected Series that is not a legal or commercial entity is, by definition, incapable of being an Article 9 debtor.¹⁰⁶ Regardless, in no jurisdiction other than perhaps Illinois, Kansas, and Missouri¹⁰⁷ is the filing of a public organic record presently necessary to the formation of a Protected Series. Contrast this with the effect of a filing of a public organic record on the issue of whether a Protected Series enjoys internal liability shields.¹⁰⁸ Generally, Protected Series formed in a state other than Illinois, Indiana, Kansas, and

100. For a state tax analysis of Series LLCs, see Griffith & Long, *supra* note 17.

101. MINN. STAT. § 322B.03, subd. 44 (2015).

102. DEL. CODE ANN. tit. 6, § 18-215 (2016).

103. *Id.*

104. TEX. BUS. & ORGS. CODE ANN. § 101.605 (2009).

105. ALA. CODE § 10A-5A-11.01 (2014); DEL. CODE ANN. tit. 6, § 18-215 (2016); MO. REV. STAT. § 347.039 (2013); NEV. REV. STAT. § 86.1255 (2005); OKLA. STAT. tit. 18, § 2054.4 (2004); P.R. LAWS ANN. tit. 14 § 3967 (2009); TENN. CODE ANN. § 48-249-309 (2012).

106. See U.C.C. § 1-201(b)(25) (AM. LAW INST. & UNIF. L. COMM'N 2015) (providing definition of "organization"); U.C.C. § 1-201(b)(27) (providing definition of "person").

107. 805 ILL. COMP. STAT. 180/37-40(d) (2017); KAN. STAT. ANN. § 17-76,143(d) (2012); MO. ANN. STAT. § 347.186(4) (2013). Each provides the Protected Series existence begins upon the filing of the certificate of designation or the articles of organization, as applicable.

108. D.C. CODE § 29-802.06(b)(4) (2011) requires filing with the Mayor's office as a condition of the internal liability shields.

Missouri are not a “registered organization” as that term is used in U.C.C. Article 9.¹⁰⁹ Arguably, that may be true for D.C. and Montana, as they either require a certificate of designation or the Protected Series operating agreement¹¹⁰ to be filed for the internal liability shields. Instead, most Protected Series are analogous to limited liability partnerships, which are not registered organizations for precisely the same reason.¹¹¹ Thus, even if a Protected Series is properly an Article 9 debtor, its location is not necessarily the jurisdiction in which it is formed (the special rule of 9-307(e) is for registered organizations).¹¹² The Series LLC itself, however, would be an Article 9 debtor and a registered organization.

VII. THE RELATIONSHIP BETWEEN SERIES LLCs AND BANKRUPTCY

The interplay between Protected Series and the Bankruptcy Code is simply unknown at this time. Under the bankruptcy code, any “person” may file a bankruptcy petition.¹¹³ Therefore, the first issue that attorneys may face is whether a Protected Series, as opposed to the Series LLC itself, is a person for purposes of filing for bankruptcy protection. For this purpose, a person includes an individual, partnership, or corporation.¹¹⁴ The defined term person does not include an estate or trust (other than a business trust).¹¹⁵ This issue has already been addressed in the LLC context. Although an LLC is not specifically identified as a person, the bankruptcy code definition is inclusive and not exclusive.¹¹⁶ The LLC was considered to be a person eligible to file because its characteristics originated from both corporations and partnerships. Therefore, the LLC is “similar enough to those entities” to be eligible.¹¹⁷ Per the bankruptcy code, the definition of “corporation” encompasses a partnership association “organized under a law that makes only the capital subscribed responsible for the debt . . . of the association.”¹¹⁸ Section 101(9)(A)(iv) of the bankruptcy code¹¹⁹ includes an unincorporated company or association and subparagraph

109. U.C.C. § 9-102(a)(71).

110. MONT. CODE ANN. § 35-8-202 (2016) (requiring the filing of the operating agreement of each Protected Series).

111. See generally PERMANENT EDITORIAL BOARD COMMENTARY NO. 17, LIMITED LIABILITY PARTNERSHIPS UNDER THE CHOICE OF LAW RULES OF ARTICLE 9, AM. L. INST. (2012) (explaining how many Protected Series are comparable to limited liability partnerships and detailing reasons why).

112. *Id.*

113. 11 U.S.C. § 109(a) (2016).

114. *Id.* § 101(41).

115. *Id.* § 101(15).

116. Under the Bankruptcy Code, “the term ‘corporation’ includes (i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust; but does not include a limited partnership.” Thus, the definition purports to be an illustrative list, not an exhaustive list. 11 U.S.C. § 101(9) (2016).

117. *In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289, 293 (Bankr. N.D. Ohio 2001).

118. 11 U.S.C. § 101(9)(A)(ii) (2016).

119. *Id.* § 101(9)(A)(iv).

(9)(B) excludes a limited partnership.¹²⁰ The Senate legislative history regarding the passage of the Bankruptcy Reform Act of 1978 clarifies this issue:

The definition of ‘corporation’ in paragraph (8) is similar to the definition in current law, section 1(8) [of former title 11]. The term encompasses any association having the power or privilege that a private corporation, but not an individual or partnership, has; partnership associations organized under a law that makes only the capital subscribed responsible for the debts of the partnership; joint-stock company; unincorporated company or association; and business trust. ‘Unincorporated association’ is intended specifically to include a labor union, as well as other bodies that come under that phrase as used under current law. The exclusion of limited partnerships is explicit, and not left to the case law.¹²¹

At this time, however, it is unclear whether a Protected Series that is not defined as an entity, even though it has entity characteristics and attributes (even though encompassed by a legal entity) may be a person under the Bankruptcy Code.¹²² Given that the law in those states that have passed Series LLC legislation makes only the capital subscribed responsible for the debts of the Protected Series (arguably an unincorporated association), many attorneys are comfortable that a Protected Series, will be a “person”—at least in the states with Series LLC statutes.¹²³ This is particularly true if it can expressly sue or be sued.¹²⁴ Others, however, are uncertain.

The bankruptcy court, in a trilogy of recent cases in Boston, accepted the filings of Protected Series in *Crush Real Estate Series, LLC 917 East Broadway Series, Sole Beneficiary of 917 East Broadway Realty Trust*,¹²⁵ *Crush Real Estate Series LLC Sole beneficiary of 427 East Sixth Street Realty Trust*,¹²⁶ and *Crush Real Estate Series LLC Sole beneficiary of 427 K Street Realty Trust*.¹²⁷ There is no indication that the bankruptcy court specifically considered whether the Protected Series had standing to file for bankruptcy, but the court did take jurisdiction. Steven J. Boyajian, lawyer for the Trustee, reported that

120. *Id.* § 101(9)(B).

121. S. REP. NO. 95-989, at 22 (1978).

122. The term “person” includes individual, partnership, and corporation. 11 U.S.C. § 101(41) (2016).

123. ALI-ABA Course of Study Materials, ST018 ALI-ABA 257 (January 2012)

124. The current draft of the Uniform Limited Liability Company Protected Series Act provides that a Protected Series is a “person”, can hold title to assets and sue and be sued. LTD. LIABILITY CO. PROTECTED SERIES ACT, NAT’L CONF. COMM’RS UNIF. STATE LAWS, http://www.uniformlaws.org/shared/docs/series%20of%20unincorporated%20business%20entities/2016AM_LCProtectedSeries_Draft.pdf (last visited Feb. 10, 2017).

125. *In re Crush Real Estate Series LLC Sole Beneficiary of 917 East Broadway Realty Trust*, No. 1:15-BK-12105 (Bankr. E.D. Mass. May 28, 2015) (Chapter 11 voluntary petition).

126. *In re Crush Real Estate Series LLC Sole Beneficiary of 427 East Sixth Street Realty Trust*, No. 1:15-BK-10237 (Bankr. E.D. Mass. Jan. 22, 2015) (Chapter 11 voluntary petition).

127. *In re Crush Real Estate Series LLC Sole Beneficiary of 427 K Street Realty Trust*, No. 1:15-BK-12106 (Bankr. E.D. Mass. May 28, 2015) (Chapter 11 voluntary petition).

because the petitions for these were dismissed for other reasons, the court never actually reached the question whether a Protected Series could file for bankruptcy.¹²⁸

Assuming that the Protected Series is a person under the Bankruptcy Code, two questions arise. The first is whether a Protected Series that is not itself in financial distress can be placed into bankruptcy if the Series LLC itself is in financial distress under the rationale of *General Growth Properties, Inc.*¹²⁹ or whether one or more of the separate Protected Series can be subject to “substantive consolidation” with the Series LLC itself and/or other Protected Series of the same Series LLC.¹³⁰

Although a discussion of the *General Growth Properties, Inc.* case and its impact on special purposes entities is beyond the scope of this Article, a short analysis of the case and how it is distinguishable in the context of Protected Series is in order. General Growth Properties, Inc. was the largest commercial real estate collapse in American history and involved 388 subsidiaries that also filed for bankruptcy.¹³¹ Many of the subsidiaries were special purpose entities directly that held a single piece of commercial real estate (generally shopping centers) in a structure that was considered “bankruptcy remote.”¹³² Many of these bankruptcy remote subsidiaries were not in financial distress.¹³³ The issue of concern in *General Growth Properties, Inc.* was whether these solvent subsidiaries could be placed into bankruptcy and whether their cash flow, which historically had been handled in a common joint operating account or cash management system, could be used in the proceedings of the parent.¹³⁴ The bankruptcy court answered in the affirmative, relying on a “corporate family” rationale to allow the use of the comingled cash flow in a restructure.¹³⁵ It did so on the belief that even the solvent subsidiaries would have trouble refinancing their debt in the market conditions that existed at the time and that the directors anticipated carrying into the future.¹³⁶ The bankruptcy court found the directors of a solvent subsidiary owed a fiduciary duty to its corporate parent, which was operating an integrated enterprise or corporate family.¹³⁷ The question, then, is how do the principles of *General Growth Properties, Inc.* apply to the Protected Series “family” of a Series LLC?

The court’s holding focused on the fiduciary duty of the board of directors of the solvent subsidiaries to the respective subsidiary’s shareholders.¹³⁸ In a Protected Series

128. Donn et al., *supra* note 81, at 83.

129. *In re Gen. Growth Prop., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

130. See Amanda J. Bahena, *Series LLCs: The Asset Protection Dream Machines?* 35 J. CORP. L. 799, 820–24 (2010) (arguing that Protected Series should not be permitted to file bankruptcy or if it can that substantive consolidation or equitable principles should combine the assets and liabilities of the Series LLC and all Protected Series).

131. *In re Gen. Growth Props., Inc.*, 409 B.R. at 55.

132. *Id.* at 61.

133. *Id.*

134. *Id.* at 46–47.

135. *Id.* at 62.

136. *In re Gen. Growth Props., Inc.*, 409 B.R. at 62.

137. For an excellent discussion of *General Growth Properties, Inc.* and its ramifications to the structured finance market, see Committee on Structured Finance, *Structuring Commercial Mortgage Securitization Special Purpose Entities After General Growth Properties*, N.Y.C. B. (July 2010), <http://www.nycbar.org/pdf/report/uploads/2007198-StructuringCommercialMortgageSecuritizations.pdf>.

138. *In re Gen. Growth Props., Inc.*, 409 B.R. at 68.

structure the Series LLC itself may not even be a member associated with the Protected Series but rather the members of the Series LLC itself or a subset of such members are likely associated with the Protected Series. In that case, the managers' or directors' duties running to their owners would not run to the Series LLC itself, and the principles set forth in *General Growth Properties, Inc.* would not apply. If, on the other hand, the Series LLC was itself the sole member (or perhaps the almost sole member) associated with the Protected Series, the holding of *General Growth Properties, Inc.* would apply. The Protected Series with its direct association of the members of the Series LLC, as opposed to the Series LLC itself, may provide substantially more protection than a parent corporation with a number of wholly owned corporate subsidiaries.

Independent of whether solvent Protected Series could bankrupt as part of a corporate family as discussed in *General Corporate Growth Properties, Inc.*, there is the issue of substantive consolidation. Whether one or more of the separate Protected Series and/or the Series LLC itself would be subject to "substantive consolidation" is a question presented by Series LLCs. Under the equitable doctrine of substantive consolidation, a bankruptcy court treats the bankrupt estate as if it is composed of the assets of two or more persons—even including, in some instances, the assets of debtors and non-debtors.¹³⁹ Unfortunately, there is not a uniform standard for invoking this equitable remedy.¹⁴⁰ It is generally considered appropriate where creditors or owners have disregarded the separate identities of persons or where those persons have entangled financial affairs.¹⁴¹ In essence, the requirement that the assets of the Protected Series be carefully accounted for and associated with the particular Protected Series as a condition of obtaining or maintaining the internal liability shield is really a variation of anti-consolidation on steroids.¹⁴² Whether the courts will look outward beyond the associated assets of a particular Protected Series when it comes to Series LLCs may be important. In circumstances where the Protected Series is formed in a state in which the Protected Series is not required to separately file a notice of its existence and the Protected Series in fact does not file, and/or where the titled assets are not held in the name of a particular Protected Series, there is an argument that as far as the public is concerned, the owners have perhaps disregarded the separate entities and substantive consolidation may be appropriate.¹⁴³ This will be particularly true where business operations of each are entwined.

139. Jennifer Avery et al., *Series LLCs: Nuts and Bolts, Benefits and Risks, and the Uncertainties that Remain*, 45 TEX. J. BUS. L. 9, 23–25 (2012).

140. *Id.* at 24 (discussing the "Augie/Restivo Banking" test and the "Auto-Train" test for substantive consolidation).

141. Dominick T. Gattuso, *Series LLCs—Let's Give the Frog a Little Love*, 17 BUS. L. TODAY 33, 37 (2008) ("Substantive consolidation frequently occurs where creditors extended credit to entities with interrelated activities.").

142. See Harner, et al., *supra* note 10, at 3 ("[S]eries LLC statutes require each series to maintain separate books and records with separate accounting of their assets and liabilities. This often is a factor considered under substantive consolidation.").

143. The Drafting Committee for the Limited Liability Company Protected Series Act of the National Conference of Commissioners on Uniform State Laws is considering prohibiting the Series LLC or a Protected Series from holding title to assets as a nominee for this purpose as well as to minimize nefarious games that some may try to play.

Each state's statutes will need to be examined to determine if a Protected Series can avail itself of that particular state's debtor relief laws. In the event the Series LLC must file for bankruptcy instead of a single Protected Series, the other Protected Series are likely to have complications.

VIII. INTERNAL LIABILITY SHIELDS

The issue that most concerns doing business with Series LLCs versus through a number of separate LLCs is the risk associated with the Series LLC if one or more of the Protected Series engages in business outside the state of organization. As discussed in the next Part, this risk is especially acute if the Series LLC is engaging in business in one or more states that have not passed enabling Series LLC legislation.

The Series LLC is a bit more sophisticated and requires more careful maintenance and more precise accounting than a non-Series LLC.¹⁴⁴ The existence of internal liability shields coupled with the external liability shields makes the Series LLC attractive and powerful.¹⁴⁵ While the members of a Series LLC are not at risk by law for the debt and liabilities of the Series LLC itself or that of the Protected Series, the isolation of each Protected Series from the debts and liabilities of another Protected Series or the Series LLC is not unconditional.¹⁴⁶ In Delaware, and states modeled after Delaware, the internal liability shields are conditioned on: (i) the LLC agreement providing that the assets of a Protected Series are (a) associated only with that Protected Series, and (b) the other Protected Series shall not be responsible for such; (ii) the books and records of the Series LLC and each Protected Series account for the assets associated with such Protected Series separately from the other assets of the Series LLC or any other Protected Series; and (iii) notice of the potential Protected Series' internal liability shields is in the certificate of formation or similar document filed with the Secretary of State.¹⁴⁷ Failure to maintain books and records and/or sloppy bookkeeping can cause the loss of the internal liability shield among some or all of the Protected Series of a Series LLC under the statute's terms and conditions.¹⁴⁸ In Delaware and several other states there is no requirement to disclose the actual existence of the Protected Series of a Series LLC nor how many Protected Series that may exist with respect to the Series LLC at any point in time. However, some states require a separate filing for each Protected Series as a condition for the internal liability shields or disclosure of the existence of each Protected Series even though it is not a condition for the internal shields.¹⁴⁹

Every jurisdiction that has passed Series LLC enabling legislation has required books and records relating to the Protected Series be maintained. Eight jurisdictions require "separate and distinct" records be maintained for each Protected Series and the Series

144. Harner et al., *supra* note 10, at 1.

145. Shannon L. Dawson, *Series LLC and Bankruptcy: When The Series Finds Itself in Trouble, Will It Need Its Parent to Bail It Out?*, 35 DEL. J. CORP. L. 515, 519 (2010).

146. DEL. CODE ANN. tit. 6, § 18-215 (2014).

147. *Id.*

148. *Id.*

149. *See infra* tbl. 4.

LLC.¹⁵⁰ Four states require “records maintained for” the Protected Series and the Series LLC.¹⁵¹ Only Puerto Rico provides for “records maintained (directly or indirectly, including through a nominee or otherwise) for any such series.”¹⁵² The failure to keep appropriate records can be fatal to the internal liability shields.

While the association of assets with each Protected Series may be considered as a part of the books and records requirement, it is actually a separately articulated requirement found in each enabling statute. The books and records and the requirement of association of assets to each specific Protected Series makes knowing the management of the Series LLC a major issue. Unless a potential member is very comfortable with the integrity and precision of the management of the Series LLC and each Protected Series, the prospective member should not become a member of the Series LLC even if it is only doing business in the state of organization.¹⁵³ As a practical matter, how a member not involved in the daily activities of a Protected Series can know if the books and records of the Series LLC and of each Protected Series are being kept in a proper manner may be very difficult. Perhaps consideration should be given to providing in the operating agreement that unrelated members of each Protected Series have the right to inspect and copy the books and records to ensure compliance with this provision of the statute.¹⁵⁴ Additionally, Series LLCs with unrelated members should perhaps require at least a review, if not an annual audit, of the Series LLC and each Protected Series to confirm the maintenance of proper books and records.¹⁵⁵ If audits or other reviews are to be required, it is recommended that the same firm perform the audit or review of all Protected Series and the Series LLC in order to have an appropriate overview of the assets and liabilities. At a minimum, consideration should be given to requiring that at least one member has the authority to inspect and copy the books and records to ensure compliance with the statute.

If a substantial liability is incurred with respect to a single Protected Series of a Series LLC, and the assets of such Protected Series in which the liability arose are woefully inadequate, an unsatisfied creditor, particularly a significant judgment creditor, is very likely to challenge the adequacy of the books and records.¹⁵⁶ Such an unsatisfied creditor

150. ALA. CODE § 10A-5A-11.02(b)(1) (2014); D.C. CODE § 29-802.06(b)(1) (2013); 805 ILL. COMP. STAT. 180/37-40(b) (2014); IOWA CODE § 489.1201(2)(b) (2009); MO. REV. STAT. § 347.186.2(1)(b) (2013); MONT. CODE ANN. § 35-8-304(4)(a) (2013); NEV. REV. STAT. § 86.296(3)(a) (2016); OKLA. STAT. tit. 18, § 2054.4.(B) (2014); TENN. CODE ANN. § 48-249-309(b)(1)(B) (2012); UTAH CODE ANN. § 48-3a-1201(2)(b) (West 2015).

151. DEL. CODE ANN. tit. 6, § 18-215(b) (2014); IND. CODE § 23-18.1-1-1 (2016); KAN. STAT. ANN. § 17-76,143(b) (2012); TEX. BUS. ORGS. CODE ANN. § 101.602(b)(1) (2009).

152. P.R. LAWS ANN. tit. 14, § 3967(b) (2009).

153. Avery et al., *supra* note 139, at 14–16.

154. For a Series LLC in which the various Protected Series are effectively different investment vehicles, this right may be seen as rather intrusive and potentially exposing proprietary information to third parties.

155. See Carol R. Goforth, *The Series LLC, And A Series of Difficult Questions*, 60 ARK. L. REV. 385, 400 (2007) (highlighting that while record-keeping requirements exist, the requirements are not specified).

156. Bahena, *supra* note 130, at 817 (“[I]f a series failed to follow SLLC statutory guidelines for series separateness, such as maintaining separate books and records, courts could disregard that series’ liability shields by applying substantive consolidation or enterprise liability principles.”).

is also likely to challenge whether the assets of the separate Protected Series were properly associated in an attempt to collapse the internal liability shields.¹⁵⁷

If the books and records of a Series LLC with multiple Protected Series have significant errors with the association of assets between two but not all of the Protected Series and a liability arises and claims are made, are only the two Protected Series with the overlapping errors susceptible to being combined into one for purposes of satisfying a claim or judgment or are all of the Protected Series at risk? Logically, only the specific Protected Series (or Series LLC itself) with deficient books and records or deficient association of assets will have its or their assets exposed to the claims of creditors of any other Protected Series or of the Series LLC.¹⁵⁸ However, there is no known definitive answer. One must remember, the accounting and property records are not simply factors in determining whether the corporate veil will be pierced within the Series LLC, but whether internal limited liability shields even exist.¹⁵⁹

Although it may not have been the intention of the legislatures, a technical reading of the statutes indicates that if assets are not properly associated, the internal liability shield of the specific Protected Series is blown, and technically, that particular Protected Series is exposed to the debts, liabilities, and obligations of the Series LLC and that of all other Protected Series.

Table 3
Potential Consequence of Improper Association of Series Assets

157. Goforth, *supra* note 155, at 398 (“Unless and until bankruptcy law recognizes series as separate legal entities, bankruptcy of a single series might well jeopardize assets of the LLC and the other series as well. If a bankruptcy court consolidates the assets and liabilities of the series, the anticipated benefits of limited liability between the series would disappear.”).

158. If the assets of a Protected Series are used to satisfy the liability of another Protected Series because of a failure to keep discrete books and records or to properly associate assets, does such Protected Series have a claim for unjust enrichment against the Protected Series with the claim?

159. UNIF. STATUTORY TR. ENTITY ACT § 401 (UNIF. LAW COMM’N 2009).

State	No Limited Liability for the Series Not Properly Associated	Potentially No Limited Liability for Any Series if One Series is Improper	Unassociated Asset is Subject to the Claims of Any Protected Series or the Series LLC ¹⁶⁰	Citation
AL	X			ALA. CODE §§ 10A-5A-11.02(a), (b)(1) (1975)
DE	X			DEL. CODE ANN. tit. 6, § 18-215(b) (2016)
DC	X	Maybe?		D.C. CODE § 29-802.06(b)(1) and (2) (2013)
IL	X			805 ILL. COMP. STAT. 180/37-40(b) (2016)
IN	X			IND. CODE § 23-18.1-1-1 <i>et seq.</i> (2016)
IA	X			IOWA CODE ANN. § 489.1201(2) (2009)
KS	X			KAN. STAT. ANN. § 17-76,143(b) (2015)
MO	X			MO. ANN. STAT. § 347.186.2(1) and (2) (2013)
MT	X			MONT. CODE ANN. § 35-8-304(4) (2015)
NV	X			NEV. REV. STAT. ANN. § 86.296(3) (2015)
OK	X			OKLA. STAT. ANN. tit. 18, § 2054.4.B (2004)
PR	X			P.R. LAWS ANN. 14 § 3967(b) (2009)
TN	X			TENN. CODE ANN. § 48-249-309(1)(b) (2012)
TX ¹⁶¹	X			TEX. BUS. ORGS. CODE ANN. §§ 101.602(a), (b)(1) (2009)
UT	X			UTAH CODE ANN. § 48-3a-1201(2)(b), (c) (2014)

160. The current draft of the Limited Liability Company Protected Series Act of NCCUSL applies an asset-by-asset approach for association failure. At this time, as the table clearly demonstrates, no enabling statute does this.

161. Texas law treats the Series LLC and its Protected Series as one entity for tax purposes thereby voiding the internal liability shields with respect to Texas taxes and perhaps taxes in other states if their conflict of laws would follow Texas Law. *See* TEX. COMPTROLLER, *Texas Franchise Tax Frequently Asked Questions, Question and Answer* (Mar. 6, 2016), <https://www.comptroller.texas.gov/taxes/franchise/faq/>.

As the Table above indicates, it appears that all existing statutes, with the possible exception of the District of Columbia, will collapse the internal liability shield of only the Protected Series or the Series LLC with the inaccurate association of assets. While the authors believe the better reading of the District of Columbia statute renders this result, it may be possible to argue that the District of Columbia statute could cause a loss of all internal shields in such a situation with all of the assets of each of the Protected Series and the Series LLC itself exposed to the claims of any creditor of any of the Protected Series or the Series LLC. The District of Columbia statute provides in relevant part:

The debts, obligations and other liabilities of a series of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the series and not of the limited liability company generally or any other series thereof; provided that:

(1) Separate and distinct records are maintained for the limited liability company and each series;¹⁶²

(2) Assets associated with the limited liability company and each series are held, directly or indirectly, including through a nominee or otherwise, and accounted for separately in the separate and distinct records¹⁶³

Although it would be rather harsh for a court to interpret the above language to terminate all of the internal liability shields, the reader should reach his or her own judgment as to the meaning of the above excerpt. Arguably “a series of” introductory language will limit the damage to the specific Protected Series with the improper asset association, but the requirement language refers to separate and distinct records and association for each Protected Series and the Series LLC. Other jurisdictions use a different articulation, often specifically referring to the “particular series” or “that series,” i.e., a specific Protected Series.¹⁶⁴

If the association errors are minor, will a court impose a *de minimis* rule and disregard immaterial errors? If material errors exist and are subsequently corrected, do the errors jeopardize the internal shields of any Protected Series with respect to obligations or liabilities that existed while the errors exist:

- Until the error is corrected?

162. The statute does not say “such series” or “the series” but “each series” which can be read to require all series to comply as a condition of the internal shields.

163. D.C. CODE § 29-802.06(b)(1)–(2) (2013) (emphasis added).

164. ALA. CODE § 10A-5A-11.02(b)(1) (1975) (that series); DEL. CODE ANN. tit. 6, § 18-215(b) (2016) (a particular series); 805 ILL. COMP. STAT. ANN. 180/37-40(b) (2016) (a particular series); IND. CODE § 23-18.1-1-1 (2016) (all series); IOWA CODE ANN. § 489.1201(2)(b) (2009) (that series); KAN. STAT. ANN. § 17-76,143(b) (2015) (particular series); MO. REV. STAT. § 347.186.2(1) (2013) (particular series); MONT. CODE ANN. § 35-8-304(4) (2015) (particular series); NEV. REV. STAT. ANN. § 86.296(3) (2015) (particular series); OKLA. STAT. tit. 18, § 2054.4.B (2004) (particular series); P.R. LAWS ANN. tit. 14, § 3967(b) (2009) (particular series); TENN. CODE ANN. § 48-249-309(b)(1) (2012) (particular series); TEX. BUS. ORGS. CODE ANN. § 101.602(a)(1) (2009) (particular series); UTAH CODE ANN. § 48-3a-1201(2) (West 2014) (particular series).

- If the error is corrected before a liability arises?
- If the error is corrected before a claim is made?
- If the error is corrected after a claim is made but before litigation?
- If the error is corrected after litigation commences?
- If the error is corrected after an adverse judgment but before collection proceedings?

Presumably, the answer to some of the questions above may depend on whether the errors are significant, pervasive, material, or immaterial. Logically, if errors are corrected before a transaction is entered into or before a tort event arises, the internal shields should hold. Under the statutes requiring the accurate association, the knowledge of the other party should be irrelevant. The statutes do not require reliance. In the authors' view, it is likely that if the error is outstanding when a claim is made and/or perhaps when the liability arises and prior to the claim, the shields are susceptible of being pierced. If an error occurs after the liability-creating event but is cured before the claim is made, what is the status of the internal shields? Until case law develops and/or statutes are clarified, we may not actually know where the line(s) is/are.

Is the degree of common ownership among or between the Protected Series that have accounting issues legally or practically relevant? There is nothing in Series LLC statutes that indicate any legal relevance; however, the optics of identically or similarly owned Protected Series is not good when a court is attempting to determine whether the errors are sufficient to collapse internal shields.

If the internal shields between two Protected Series are pierced, are only the assets that are not properly associated to the claims arising from the other Protected Series, or are all assets of both Protected Series exposed? The current draft of the Limited Liability Protected Series Act by the NCCUSL drafting committee adopts an asset-by-asset and liability-by-liability approach and limits the creditor rights and the asset exposure of other Protected Series in this manner.¹⁶⁵ Presumably this approach will cause the courts to be stricter on the requirements relating to accounting, books, and records and association but make the correction narrower than it may be otherwise. This approach avoids the "all or nothing" risk to the members and the creditor but probably will cause specific assets to be more easily exposed for the debts and obligations of other Protected Series or that of the Series LLC itself.

If a successful claim is made against a Protected Series that is unable or difficult to satisfy, the claimant may well "investigate" the books and records of the other Protected Series and its asset association seeking to glum onto additional assets for claim satisfaction. This "investigation" can be a costly distraction for the other Protected Series or the Series LLC that had nothing to do with the events giving rise to the claim. An attorney may wish to consider cross indemnification for such expenses against the Protected Series whose actions gave rise to the claim, particularly if the associated members are substantially different between or among the Protected Series.

IX. RESPECTING LIABILITY SHIELDS OF SERIES LLCs IN STATES OTHER THAN STATE OF ORGANIZATION

165. LTD. LIABILITY CO. PROTECTED SERIES ACT §§ 401, 402 (UNIF. L. COMM'N 2016).

The most serious risk of a Series LLC doing business in a state that does not have Series LLC legislation is that the law is presently unsettled or unknown as to the effectiveness of the internal liability shield of a Protected Series in these foreign states. Liability shields for corporations can take protection from the Full Faith and Credit Clause in the United States Constitution and perhaps the Internal Affairs Doctrine.¹⁶⁶ However, the interpretation of how these doctrines are applied to Series LLCs is unclear and may vary from state to state.¹⁶⁷ These uncertainties require clients to carefully consider their options when looking to expand the business of a Series LLC into foreign jurisdictions. If there is a diversity of associated members among the various Protected Series, restrictions on engaging in business in other jurisdictions (or jurisdictions that have not passed enabling legislation) may be considered as such activity could produce liability for all of the Protected Series and the Series LLC.

It is commonly assumed that if a state has enacted Series LLC legislation, it will recognize all Series LLCs created in other states and honor the internal liability shields.¹⁶⁸ While this is probably true, the authors believe there is a possibility this assumption may not always be correct, depending on the circumstances. The jurisdictions that have passed Series LLC legislation have different provisions regarding foreign Series LLCs and the internal liability shields. Four jurisdictions clearly state, in essence, if a foreign Series LLC's documents provide that the debt, liabilities and obligations with respect to a particular Protected Series are limited to the assets associated with such Protected Series, such limitation will be honored.¹⁶⁹ Four jurisdictions contain the internal shield language in their registration to do business provision that describe what constitutes a foreign Series LLC with Protected Series and provide a registration so stating, but have a separate sentence in the same paragraph honoring the internal shields for "such series" [i.e., such Protected Series].¹⁷⁰ Does "such series" in these statutes only refer to a foreign Series LLC that is registering or all foreign Series LLC and Protected Series that may be sued in such state? Six states provide a mechanism for the Series LLC to register and describe what is in the registration but do not expressly address whether the internal liability shields of a registered or unregistered Series LLC will be honored.¹⁷¹

166. Byron F. Egan, *Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code*, 42 TEX. J. BUS. L. 71, 210 (2007).

167. Since states differ in their approach to creation and recognition of Series LLCs, one can infer that states will also differ in their interpretation of these doctrines as applied to Series LLCs.

168. Adrienne Randle Bond & Allen Sparkman, *The Series LLC: A New Planning Tool*, 45 TEX. J. BUS. L. 57, 83–84 (2012). In addition, the discussions of the Drafting Committee for the Limited Liability Company Protected Series Act seem to assume that if a state passes an enabling statute for the Series LLC that any Series LLC and the associated Protected Series formed in another state would be honored—at least if it properly qualified to do business in the state foreign to its organization.

169. Alabama (ALA. CODE § 10A-5A-1.05 (2016)); District of Columbia (D.C. CODE § 29-105.01 (2017)); Indiana (IND. CODE ANN. § 23-18.1-7-3 (2016)) and Nevada (NEV. REV. STAT. § 86.544 (2013)).

170. Illinois (805 ILL. COMP. STAT. 180/37-40 (2017)); Kansas (KAN. STAT. ANN. § 17-76,143(o) (2015)); Missouri (MO. REV. STAT. § 347.186 (2013)); and Puerto Rico (P.R. LAWS ANN. tit 14, § 3967(m) (2016)).

171. Delaware (DEL. CODE ANN. tit. 6, § 18-215(o) (2016)); Iowa (IOWA CODE § 489.1206 (2009)); Montana (MONT. CODE ANN. § 35-8-1003 (2016)); Oklahoma (OKLA. STAT. tit. 18, § 2054.4(M)); Tennessee (TENN. CODE ANN. § 48-249-309 (2012)); and Texas (TEX. BUS. & ORGS. CODE ANN. 9.005(b) (2009)).

The loss of the internal liability shields for failure to file to qualify to do business seems rather punitive and there are generally specific statutory provisions saying what happens if a foreign entity does not qualify. However, prudence would indicate that if a Series LLC or Protected Series is sued or likely to be sued in such a state, prompt corrective qualification and registration should occur. Utah is unique and its foreign Series LLC internal shields language is in a provision that states:

[a] foreign limited liability company that is registered to do business in this state that is governed by an operating agreement that establishes . . . [n]otice in a foreign limited liability company's foreign registration statement of the limitation on liability of a series as referenced in this section shall have the same effect found in Section 48-3a-1202 as a notice of limitation on liability of a series set forth in a limited liability company's certificate of organization.¹⁷²

The notice in the certificate of organization is a requirement for the internal shields in Utah. Does this mean that unless a foreign Series LLC is qualified to do business in Utah at the time of the cause of action arose Utah courts will not honor the internal liability shields? The authors expect that in the case of foreign Protected Series operating in jurisdictions (perhaps other than Utah) that have enacted Series LLC legislation the internal shields will be honored even if a Series LLC and/or Protected Series did not timely qualify to do business but corrects this error before trial.

Clearly there is no social policy against the recognition of the internal shields in states that have enacted Series LLC legislation. It is conceivable, however, that at least in some of the jurisdictions which require public notice through filings that identify the Protected Series that exist as a condition of the domestic internal shields, the failure to have qualified in advance and disclosed such Protected Series (particularly if their existence and identity was not disclosed in the state of organization) could result in the loss of the internal liability shields. The specific language of the foreign Series LLC statute of the specific state in which a foreign Series LLC desires to engage in business should be carefully studied by the attorney representing the Series LLC or a Protected Series before advising the Series LLC not to register and/or what language to put in the registration.

A state's public policy may require a minimum level of public disclosure to honor the internal liability shields and quasi-entity or person status of the Protected Series and the Series LLC for such purposes. A number of preventative and protective measures are suggested later in this article that may help a Protected Series doing business in other states with or without Series legislation. Perhaps the only absolutely certain "safe" way to use a Series LLC at this point is within the state in which it is formed, in the jurisdictions of Alabama, the District of Columbia, Indiana, and Nevada, although the authors believe it should be "safe" to use a Protected Series in states with series laws requiring the same or lesser disclosure and record keeping as in the state of organization. This is particularly true if there is disclosure in the foreign qualification to do business equivalent to that required

172. UTAH CODE ANN. § 48-3a-1209 (West 2014).

for domestic Series LLCs and Protected Series and the foreign Series LLC or foreign Protected Series timely qualified.

X. GENERAL RULES OF COMITY AND FULL FAITH AND CREDIT

The Full Faith and Credit Clause generally requires states to recognize the public acts of foreign states.¹⁷³ While on its face this would include the recognition of the internal liability shields of a Protected Series with respect to liabilities arising from other Protected Series of the same Series LLC or from an action of the Series LLC itself, there is a long recognized public policy exception to the recognition of the laws of a foreign state.¹⁷⁴ The exception recognizes the authority of one state to refuse to give full faith and credit to the laws of another state when doing so would violate or harm the health, safety and welfare of that state. Since the public policy exception does not apply to the judgments of other states' courts, a sister state is not required to enforce the laws of another state when the law is "obnoxious" to the public policy of the reviewing state.¹⁷⁵

A choice-of-law problem lies at the core of determining the impact of the Full Faith and Credit Clause on the potential liability of a Protected Series in a foreign jurisdiction that has not authorized Series LLCs for actions by another Protected Series in the same Series LLC. While there has not been a final adjudication by the courts with respect to Series LLCs, a very similar problem with respect to external liability shields occurred in the early days of LLCs before every state had adopted statutory LLC authorization, as discussed below.¹⁷⁶ This problem also exists with respect to statutory trusts permitting series to do business in states that recognize statutory trusts but do not have the series concept with internal shields in their statutes. The treatment of choice-of-law problems and their connection to the Full Faith and Credit Clause in that context is illustrative of how courts may treat a foreign Series LLC and one or more Protected Series doing business in a non-series jurisdiction.¹⁷⁷

Although not involving LLCs, a potentially controlling case in this area of the law is *Allstate Insurance Co. v. Hague*.¹⁷⁸ Here, like in most other choice-of-law tests, the United States Supreme Court focused on fairness and due process concerns. In *Hague*, a Wisconsin resident was killed in a traffic accident by another Wisconsin resident in Wisconsin.¹⁷⁹ Neither the driver of the car at fault nor the individual driving the decedent were insured.¹⁸⁰ However, the decedent had three automobiles on a policy that insured against damage done

173. Kaleen S. Hasegawa, *Re-evaluating the Limits on the Full Faith and Credit Clause After Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747, 752–53 (1999).

174. *Id.* at 748.

175. *Id.*

176. See Jim Hyde, *Constitutionally Mandated Fairness and the Limited Liability Company: An Argument for the Extra-Territorial Application of Limited Liability Company Statutes*, 1 GEO. MASON INDEP. L. REV. 83, 84–92 (1992) (providing history of external liability shields prior to adoption of statutory LLC legislation in every state).

177. *Id.*

178. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315–18 (1981).

179. *Id.* at 305.

180. *Id.*

by uninsured drivers.¹⁸¹ The defendant, a Minnesota insurance company, issued this policy.¹⁸² Shortly after the accident, the decedent's wife moved to Minnesota and sued the insurance company.¹⁸³ In her suit, she asked that the three policies be "stacked" in accordance with Minnesota law, even though Wisconsin law prevents such stacking of policies.¹⁸⁴

The Minnesota court allowed the stacking through application of its own law.¹⁸⁵ The Supreme Court upheld the application of Minnesota law stating "the Court has invalidated the choice of law of a State which has no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or the transaction," and that because the policies were issued by a Minnesota company, it had sufficient contacts with the state to allow the application of Minnesota law.¹⁸⁶ It should be noted that Minnesota law in that case had a specific statute permitting the stacking of policies. In the circumstances involving Series LLCs, it is likely no statute provides that entities cannot have internal liability shields. In other words, there is not a specific contrary law on point in the Series LLC scenarios.

Taken together, the Full Faith and Credit Clause analysis and the choice-of-law analysis show several potential pitfalls for a Protected Series doing business in a non-Series LLC jurisdiction. The Supreme Court's most relevant cases discussing the public policy exception to the Full Faith and Credit Clause seem to indicate that the exception could greatly affect the future of Series LLCs.¹⁸⁷ Although substantive case law on the subject exists, there is no clear standard of application. This presents a potential danger for a Series LLC and its Protected Series doing business in a non-Series LLC jurisdiction.¹⁸⁸ Since there appears to be little precedent for applying the forum state's laws in a choice-of-law scenario, a court may be inclined to apply the concepts of non-Series LLC law of the forum where the Series LLC is doing business rather than the laws of the state of organization. This poses an interesting dilemma where the forum state has no law concerning Series LLCs or perhaps no history dealing with any form of series business structure. Thus, there is a significant risk that some non-Series LLC jurisdictions in which a Series LLC were to do business would apply their own set of laws and extrapolated judicial doctrines to ignore the internal liability shield and assign liability to the Series LLC and its Protected Series. It is also potentially possible that a state with Series LLC legislation requiring the filing of information concerning the Protected Series as a prerequisite for their own state's Series LLC internal liability shields would apply their own law and require such filings if a foreign Protected Series' internal liability shields are to be recognized and the foreign Series LLC

181. *Id.*

182. *Id.* at 306.

183. *Hague*, 449 U.S. at 305.

184. *Id.* at 306.

185. *Id.*

186. *Id.* at 308.

187. See *Baker v. General Motor Corp.*, 522 U.S. 222, 233 (1998) (discussing how judgments in one state can govern in other states and how policy implicates choice of law determinations).

188. See Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 765-66 (1998) (discussing differing jurisdictional interpretations of the Full Faith and Credit Clause regarding state court judgments).

or Protected Series, as applicable, did not qualify to do business in such state before the “problem.”

XI. CHOICE OF LAWS

Another issue that arises with the creation of a Series LLC is the question of what law will apply in the event a Series LLC is sued or files suit against another party. There are two main situations that may occur that would present a choice of law question. First, if a Series LLC is sued in a jurisdiction that has enacted Series LLC legislation, then under common law choice of law analysis, the state court will apply the law of the state where the Series LLC was created.¹⁸⁹ However, if the Series LLC is sued in a jurisdiction that does not recognize Series LLCs or that has not enacted Series LLC legislation, then the Series LLC faces much uncertainty about which law the court will apply.¹⁹⁰ In this situation, some attorneys theorize that “[c]hoice of law provisions may apply so that the foreign jurisdiction has to recognize the laws where the company is organized,” but these attorneys note that “it is unclear what happens if the foreign jurisdiction is not forced to recognize an entity as a separate Subunit.”¹⁹¹

When advising a client or arguing to a court that the law of the state where a Series LLC was formed should apply, an attorney could look to Restatement (Second) of Conflict of Law Section 307 for guidance.¹⁹² Section 307 states that “[t]he local law of the state of incorporation will be applied to determine the existence and extent of a shareholder’s liability to the corporation for assessments or contributions and to its creditors for corporate debts.”¹⁹³ At least one author believes that before Section 307 can apply, however, a state must consider a Protected Series to be a legal entity.¹⁹⁴ As discussed previously, states differ in their approach to whether an individual Series LLC is considered a separate legal entity or perhaps a person. For purposes of annual filing fees it appears that most states treat the Series LLC and all of the Protected Series as a single entity with a single fee.¹⁹⁵ Texas treats all the series in a Series LLC as a single legal entity for its franchise taxes.¹⁹⁶ Most states seem to accept the federal approach of each Protected Series is considered a separate income tax reporting entity.¹⁹⁷ If a state is silent regarding whether or not it views

189. Avery et al., *supra* note 137, at 15.

190. *Id.*

191. *Id.*

192. Thomas E. Rutledge, *The Internal Affairs Doctrine and Limited Liability of Individual Series Within a Series LLC*, 17 BUS. ENTITIES 4, 7–9 (2015) (discussing how series LLCs are treated by different legal doctrines such as international liability and tax).

193. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (AM. LAW INST. 1971).

194. Rutledge, *supra* note 190, at 7–9.

195. Griffith & Long, *supra* note 100, at 11.

196. *See Texas Franchise Tax*, TEX. COMPTROLLER, <https://comptroller.texas.gov/taxes/franchise> (last visited Jan. 23, 2017). A series LLC is treated as a single legal entity. It pays one filing fee and registers as one entity with the Texas Secretary of State. It files one franchise tax report and one Public Information Report as a single entity, not as a combined group, under its Texas taxpayer identification number. If one of the series has nexus in Texas, the entire series LLC has nexus in Texas. *See also* TEX. POL. LTR. RUL. NO. 201005184L (May 5, 2010).

197. Griffith & Long, *supra* note 17, at 12.

individual series as separate legal entities, Section 298 of the Restatement (Second) of Conflict of Laws provides that

[a]n organization formed in one state will be considered a corporation within the meaning of a statute or rule of another state if the attributes the organization possesses under the local law of the state of its formation are sufficient to make it a corporation for the purposes of the statute or rule.¹⁹⁸

As discussed herein, the Protected Series has corporate attributes of limited liability to its associated members, the power to sue and be sued, etc. but is not labeled as an entity.¹⁹⁹

Since the Comments of Section 298 do not provide guidance on how the test in Section 298 should be applied, an attorney advising a client regarding a foreign jurisdiction's treatment of a Series LLC still faces quite a bit of uncertainty regarding which law the foreign jurisdiction might apply.²⁰⁰ If the foreign jurisdiction chooses to apply the law of the formation state, then the internal limited liability shields might be recognized.²⁰¹ However, if the foreign jurisdiction chooses to apply its own law, which does not recognize the existence of Series LLCs, the internal limited liability shields would essentially be collapsed, and the Series LLC would be construed as a single legal entity.²⁰²

XII. DOCTRINE OF INTERNAL AFFAIRS

The Internal Affairs Doctrine is a generally accepted conflict of laws principle stating the law of the state of incorporation governs the internal affairs of a corporation in courts of foreign jurisdiction.²⁰³ Many believe the Internal Affairs Doctrine may control the recognition of the internal liability shields.²⁰⁴ Generally, internal affairs are considered particular matters among or between the entity and its officers, directors, agents, shareholders and other owners or any other matter closely related to the management and control of the entity.²⁰⁵ The underlying rationale of the doctrine is to minimize risks to

198. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 298 (AM. LAW INST. 1971).

199. The Protected Series has the option to elect to be treated as a separate entity in the District of Columbia (D.C. CODE § 29-802.06(h) (2012)), Illinois (805 ILL. COMP. STAT. 180/37-40(b) (2017)), and Indiana (IND. CODE § 23-18.1-1-1 (2016)).

200. Rutledge, *supra* note 190, at 8 (“[T]he *Restatement* does not provide guidance with respect to either a comprehensive listing of the factors that should be considered, the relative weighting of those factors, or the minimum threshold . . . of the factors that will result in a particular organization being classified, for purposes of section 298, as a ‘corporation equivalent.’”).

201. *See* Avery et al., *supra* note 137, at 15 (stating it is uncertain whether or not an entity would be recognized in a foreign jurisdiction).

202. *See* Allen Sparkman, *Series LLCs in Interstate Commerce*, BUS. L. TODAY 1, 3–4 (Feb. 2013).

203. *Edgar v. MITE Corp.*, 457 U.S. 624, 625 (1982).

204. *See generally* Allen Sparkman, *Fifth Circuit Misses Opportunity to Bring Clarity to Series LLC Questions*, BUS. L. TODAY 1 (2014).

205. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. a (AM. LAW INST. 1971).

incorporators and entity owners by providing predictability, certainty, and uniformity of results in actions arising before the court.²⁰⁶ Further, if the doctrine were not applied, an entity may face conflicting laws and liabilities in each of the states where it conducts its business and thus deter business entities from interstate commerce and fuel confusion as to entity law as a whole.²⁰⁷ This conflict is, of course, a form of the issues facing Series LLCs and Protected Series doing business in states without enabling Series LLC legislation.

While some states have codified the Internal Affairs Doctrine, in other states the doctrine remains essentially in common law and is utilized at the discretion of the courts.²⁰⁸ A court may decide to try the case under the laws of the forum state if there is an overriding public interest for the law of the forum state to govern over the state of incorporation or organization.²⁰⁹ It is also important to recognize that the Internal Affairs Doctrine generally does not apply to third party cases involving contract or tort law.²¹⁰ These areas of law are not as concerned with the rationale of congruity and unity of outcomes as with internal entity law.²¹¹

There is legitimate concern about whether various states will recognize and give effect to the internal liability shields that make a Series LLC appear attractive for certain kinds of business transactions. As discussed previously, a dozen states plus D.C. and Puerto Rico have already passed Series LLC legislation.²¹² As can be seen in the following table, of those jurisdictions, fewer than half require specific public notice of the existence of a given series as a precondition to its enjoying internal shields.

Table 4
Select Series LLC Filing Information²¹³

State	Express Liability Shield for Protected Series in Statute	Must a Certificate of Designation be filed for each Potential Series to form such	Must the Protected Series include the Name of the Series LLC?	Is the Name of Each Individual Protected Series on Public Record?	Does the Certificate of Good Standing for the Series LLC Indicate Series	May a Protected Series Obtain a Good Standing Certificate?	Is there Express Authorization for a Foreign Series LLC to Qualify to do Business?
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206. *Id.* § 302, at cmt. b.

207. *Id.*

208. *In re Flashcom, Inc.*, 308 B.R. 485, 489–90 (U.S. Bankr. Ct. C.D. Cal. 2004).

209. *Id.*

210. *See VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (explaining the scope of the Internal Affairs Doctrine).

211. *See Vertrue, Inc. v. Meshkin*, 429 F. Supp. 2d 479, 503–04 (D. Conn. 2006) (explaining the scope of internal entity law).

212. *Supra* notes 29–43 and accompanying text.

213. Griffith & Long, *supra* note 17.

		Protected Series?			LLC Status?		
AL	Yes	No	No	No			
DE	Yes	No	No	No	Yes	No	Yes
DC	Yes	Yes	Yes	Yes	Yes	Yes	No
FL	—	—	—	—	—	—	Yes
IL	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IN	Yes	Yes	Yes	Yes	Yes	Yes	Yes
IA	Yes	No	Yes	No	No	No	Yes
KS	Yes	No	Yes	Yes	Yes	No	Yes
MO	Yes	Yes ²¹⁴	Yes	Yes	No	No	Yes
ME	-	-	-	-	-	-	Yes ²¹⁵
MT	Yes	Yes ²¹⁶	Yes	Yes	Yes	No	Maybe ²¹⁷
NV	Yes	No	No	No	No	No	Yes
OK	Yes	No	No	No	No	No	Yes
PR	Yes	No	No	No	No	No	Yes
TN	Yes	No	No	No	No	No	Yes
TX	Yes	See Note ²¹⁸	No	Yes	No	No	Yes
UT	Yes	No	No ²¹⁹	No	No	No	Yes

As can also be seen from the table above, the District of Columbia, Illinois, Indiana, Kansas, Missouri, and Montana each require a certificate of designation (or in the case of Missouri, a Protected Series operating agreement) for the Protected Series to have internal liability shields, or in some cases even exist. Additionally, Texas provides that the name of each Protected Series be on public record if it is not doing business in the name stated in the Series LLC's certificate of formation,²²⁰ but does not condition either the creation of the Protected Series or the internal limited liability shields on such filings.²²¹ In contrast,

214. Under MO. REV. STAT. § 347.186(4) (2013), the Protected Series does not come into existence until the articles of organization for the Protected Series are filed. The form Articles of Organization (LLC-1 (08/2013)) provides for the identification of each protected series (custom series) and provides that each separate series must file an Attachment Form LLCIA. *Id.*

215. ME. REV. STAT. ANN. § 1622 (2011).

216. Montana uniquely requires the operating agreement of each series of members to be in writing and be filed with the Articles of Organization. MONT. CODE ANN. § 35-8-202(1)(h) (2015).

217. The Montana Secretary of State has an "Application for Certificate of Authority for Foreign Series Limited Liability Company", revised January 2017. This form requires a list naming each series member(s) along with his or her individual Operating Agreements. *Business Forms*, MONT. SEC'Y STATE (Jan. 2017), <http://sos.mt.gov/Business/Forms>.

218. H.B. No. 1624, effective September 1, 2013, amended TEX. BUS. & COM. CODE § 71.002(2)(H) to require each protected series doing business in Texas under a name other than the name of the LLC to file an assumed name certificate for the protected series. H.B. No. 1624, 83d Leg., 2013 Reg. Sess. (Tex. 2013).

219. Effective January 1, 2014, the name of the potential series must include the name of the Series LLC. UTAH CODE ANN. § 48-3a-1201 (2013). Pre-existing Series LLCs had until January 1, 2016, to comply with such provision. UTAH CODE ANN. § 48-3a-1405 (2013).

220. TEX. BUS. & COM. CODE § 71.002(2)(H) (2015).

221. TEX. BUS. & COM. CODE §§ 101.601, 101.622 (2015)

Alabama, Delaware, Iowa, Nevada, Oklahoma, Puerto Rico, Tennessee, and Utah only require that the Series LLC's certificate of formation, or any amendment thereof, confirm that the LLC has or may in future have one or more Protected Series.²²² The identification of each Protected Series is not required.

With respect to the seven states requiring the specific identification of a Protected Series either as a condition of establishing the internal shields for such Protected Series or otherwise, the following table shows the supplemental information required.

Table 5
Comparison of Public Record Disclosure
States Requiring Separate Registration or Identification of Protected Series

	State						
	DC	IL	IN ²²³	KS	MO	MT	TX
Series Designation Form Required	X	X	X	X	X		
Operating Agreement of Each Protected Series Filed with Articles (Certificate) of Organization						X ²²⁴	
Other Filing							X ²²⁵
Name of LLC	X	X	X	X	X		X
LLC's Initial Articles (Certificate) of Organization Filing Date	X						
Unique Name for Each Series	X	X	X	X	X	X ²²⁶	X ²⁰⁶
Series Name Contains the Entire LLC Name	X	X	X	X	X		
Whether the Series has Limited Liability					X		
Street/Mailing Address (if different from the LLC)	X						

222. MO. REV. STAT. § 347.186 (2013); MONT. CODE ANN. § 35-8-103 (2001); P.R. LAWS ANN. tit. 14, § 3967 (2011); UTAH CODE ANN. § 48-3a-1201 (2016).

223. The Indiana statute was passed in 2016 and is effective January 1, 2017. At this time, the Secretary of State has not developed the form for articles of designation that is required to be filed with respect to the creation of a Protected Series. IND. CODE § 23-18.1-1-1 (2016).

224. The Montana enabling statute is unique as it requires the filing of the written operating agreement of each Protected Series with the Articles of Organization. A statement setting forth the relative rights, powers and duties of each series of members or indicating that the relative rights, powers, and duties of each series of members is required to be set forth in the operating agreement. MONT. CODE ANN. §§ 35-8-202(h)–(j) (2016).

225. If any Protected Series of the Series LLC conducts business under a name other than the name of the Series LLC, the Series LLC must file an assumed name certificate (Form 503) for the name of the Protected Series in compliance with chapter 71 of the Texas Business & Commerce Code. TEX. BUS. & COM. CODE § 71.051 (2009).

226. Unlike the enabling statute of the District of Columbia, Illinois, Indiana, Kansas, and Missouri, the enabling statutes of Montana and Texas Series LLC do not explicitly require the Protected Series to have a unique name that includes the name of the LLC. *See* D.C. CODE § 29-802.06(d)(1) (2013); 805 ILL. COMP. STAT. 180/37-40(c) (2016); IND. CODE 23-1-18.1-6-7 (2016); KAN. STAT. ANN. § 17-76,143(c) (2014); MO. REV. STAT. § 347.186.3 (2016).

Registered Agent Name and Address (if different from the LLC)	X	X ²²⁷		X ²²⁸	X ²²⁹		
Series Purpose					X		
Whether Series is Member or Manager Managed		X	X		X		
Names of the Members or Managers (as applicable, if different from the LLC)		X		X	X		
Effective Date	X				X		
Dissolution Date (if applicable)			X		X		
Name/Address Organizer					X		
Name and Signature of Authorized Executing Party (Member/Manager/Designee)	X ²³⁰	X		X	X		

Serious questions exist as to whether all of the 37 states that do not currently offer Series LLCs will honor the internal liability shields of the Series LLCs and their linked Protected Series. While it is probable that most attorneys will be comfortable with a Series LLC and its Protected Series operating in any state with enabling Series LLC legislation, in the authors' opinion there may be a question as to whether all of the states requiring specific public notice will necessarily honor internal liability shields in Series LLCs established under the laws of states that only require a general public notice that Protected Series may be created. This is particularly true when filings concerning the identity of each Protected Series have not in fact been made, even if not required in the state of organization and the foreign Series LLC and/or Protected Series did not qualify to do business in such foreign state. Some would say the integrity of internal liability shields is a matter of internal affairs, with the consequence that the forum state will apply the law of the state of organization. Others, however, disagree.²³¹

A recent unpublished Fifth Circuit Court of Appeals decision discussed the Internal Affairs Doctrine in relation to a case involving Series LLCs. The case of *Alphonse v. Arch*

227. The Registered Agent and Registered Office appointed by the Limited Liability Company in Illinois shall also serve as the agent and office for each Series. 805 ILL. COMP. STAT. 180/37-40(f) (2016).

228. The registered agent and registered office for the limited liability company in Kansas shall serve as the agent and office for the service of process in Kansas for each series. KAN. STAT. ANN. § 17-76,143(f) (2015).

229. The registered agent and registered office for the limited liability company appointed under section 347.033 shall serve as the agent and office for service of process for each series in Missouri. MO. REV. STAT. § 347.186(4)(4) (2013).

230. Certificate of Series Designation for Domestic Limited Liability Company (Form DLC-4) may be signed by the Governor or Authorized Person. See *Corporate Registration FAQs: Process*, DEP'T CONSUMER & REG. AFF., D.C. GOV., <https://dcra.dc.gov/book/corporate-registration-faqs/corporate-registration-faqs-process> (last visited Feb. 10, 2017).

231. See *Alphonse v. Arch Bay Holdings, L.L.C.*, 548 Fed. App'x 979, 986 (5th Cir. 2013). It notes that different conflict-of-laws principles apply where the rights of third parties are involved (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)) and quotes a district court decision interpreting California's choice of laws statute, to the effect that the Internal Affairs doctrine "does not apply to disputes that include people or entities that are not part of the LLC." *Id.* (quoting *Butler v. Adoption Media, LLC*, No. C04-0135 PJH, 2005 WL 2077484, at *1 (N.D. Cal. Aug. 26, 2005)).

Bay Holdings, LLC, involved an action against a Delaware Series LLC by a third party for wrongful seizure and possession of his home through foreclosure.²³² Alphonse's house had been foreclosed on by Arch Bay Holding's, LLC—Series 2010B, a Protected Series of a Delaware Series LLC.²³³ Alphonse did not contest the foreclosure action, but later brought suit in district court based on robo-signed supporting documentation and alleged fraud.²³⁴ Alphonse sued Arch Bay Holdings, LLC, the Series LLC, but not the Protected Series.²³⁵ The Series LLC alleged Alphonse sued the wrong party because the entity that had foreclosed was the Protected Series 2010B.²³⁶ The district court held that the Internal Affairs Doctrine governed the limited liability aspects of the series LLCs under the laws of Delaware, instead of the forum state, Louisiana, where Series LLC are not available.²³⁷ Thus, the action was dismissed for failure to sue the correct party, as Alphonse had named the Series LLC itself in the suit rather than the Protected Series who actually held the mortgage and foreclosed.²³⁸

The Fifth Circuit appears confused as to what is a Protected Series, characterizes Arch Bay Holdings, LLC as “the parent company” of Series 2010B, and incorrectly makes the broad statement that “Series LLCs only exist to represent the interest of the parent LLC.”²³⁹ Nevertheless, the Fifth Circuit did not see the district court's application of Delaware law as a foregone conclusion and remanded the case for further factual investigation.²⁴⁰ This investigation would decide whether the action brought against the Series LLC was internal or external, since the Internal Affairs Doctrine “does not apply to disputes that include people or entities that are not part of the LLC.”²⁴¹ If the action raised an internal matter, the laws of Delaware would apply as to the claim and presumably as well as to the limited liability structure of the Series LLC.²⁴² However, if the action raised an external matter, the rules of the forum state would govern.²⁴³ Consequently, if the court finds the action external, as it involves a third party suing under tort law, the Fifth Circuit construes that Louisiana law would govern which may or may not recognize the separateness of the Protected Series and potentially not recognize the internal liability shields.²⁴⁴ While the

232. *Alphonse*, 548 Fed. App'x at 980.

233. *Id.* at 980.

234. *Id.* at 980–81.

235. *Id.*

236. *Id.* at 981.

237. *Alphonse*, 548 Fed. App'x at 981 (noting that the district court dismissed plaintiff's action in part because “Delaware law determines Arch Bay's liability, and under Delaware law, Series 2010B is the real party in interest and is a separate juridical entity from Arch Bay”).

238. *Id.*

239. *See id.* at 982 (“[W]e must determine whether there exists sufficient “identity of the parties” between Arch Bay (the parent company) and Series 2010B (the judgment creditor)”); *id.* at 984 (“Series LLCs only exist to represent the interest of the parent LLC.”). It is possible that Arch Bay Holdings, LLC in fact was the only associated member of Series 2010B in which case the court would be correct under the factual circumstances but not as to the generality of the statement.

240. *Id.* at 986.

241. *Id.* (quoting *Butler v. Adoption Media, LLC*, 2005 WL 2077484 (N.D. Cal. Aug. 26, 2005), at *1).

242. *See Alphonse*, 548 Fed. App'x at 986–87 (holding that if the action raised an internal matter, rather than external matter, Delaware law would apply).

243. *Id.*

244. *Id.*

case involves whether the Protected Series is recognized as a separate party for purposes of being identified in litigation, the internal affairs analysis may tear down one of the potential pillars supporting the very risk protection the Series LLC was intended to provide to business owners with respect to states that do not recognize the Series LLCs with their internal liability shields.

Alphonse is one of the first cases to discuss the Internal Affairs Doctrine in the context of Series LLCs and provides some insight into how a non-Series LLC state might interpret the Internal Affairs Doctrine when applied to a foreign Protected Series doing business in a non-Series LLC state. The case may foreshadow a bleak future for Protected Series relying on the Internal Affairs Doctrine when sued in foreign courts, but it may also provide some clarity as to the role of the Internal Affairs Doctrine and whether this doctrine will support or not support the recognition of the separate Protected Series as quasi-entities that must sue or be sued in their own name in states that do not have Series LLCs.²⁴⁵ The case may also influence the tone as to treating a Series LLC in a state without such statutes as a single entity for standing purpose only or for both standing and the application of such state's law to the determination of the internal liability shields.

This case, while raising questions, will apparently not provide further guidance as it was dismissed by the district court on December 1, 2014 for lack of subject matter jurisdiction.²⁴⁶ Although plaintiff *Alphonse* again appealed the dismissal of his case to the U.S. Court of Appeals for the Fifth Circuit, the Fifth Circuit held that the district court properly dismissed for lack of jurisdiction but did not reach the issue of how the Internal Affairs Doctrine might affect Series LLCs.²⁴⁷ It should be noted that, even if the Internal Affairs Doctrine does not control, under the forum states laws and public policy, a Protected Series may still have the benefit of the internal shields under the Full Faith and Credit Clause if the state's public policies are not offended by the concept of Protected Series with internal shields. Undoubtedly, there will be further clarification as Series LLC structures become mainstream and more states adopt their own Series LLC statutes and Protected Series continue to do multi-state business.

XIII. APPLICATION OF NON-SERIES LLC STATE LAW

Just as there is no general public policy objection to the use of multiple corporations, if a rational analysis is applied, the social policy of states without Series LLC legislation should not necessarily override the full faith and credit clause application of the law of the state of creation with respect to the internal liability shields. If the Internal Affairs Doctrine does not control whether the internal liability shields of a Series LLC and its Protected Series stand under the application of the law of the state of organization, attorneys must ask whether the Full Faith and Credit Clause will cause the law of the state of organization to control. Since this issue will be one of first impression in many jurisdictions, attorneys may first have to determine whether the internal liability shields offend or are "obnoxious"

245. For a discussion of *Alphonse* and internal affairs, see Sparkman, *supra* note 204.

246. *Alphonse v. Arch Bay Holdings*, C.A. No. 12-330, 2014 WL 6674029, at *1 (E.D. La. Nov. 24, 2014).

247. *Alphonse v. Arch Bay Holdings, L.L.C.*, 618 Fed. App'x 765, 770 (5th Cir. 2015), *aff'g* C.A. No. 12-330, 2014 WL 6674029 (E.D. La. Nov. 24, 2014).

to the public policies of the state in which the action occurs. The fact that the state does not have a Series LLC statute should not be controlling,²⁴⁸ unless perhaps the legislature specifically considered such legislation and declined to pass a provision to recognize Series LLCs on the grounds that it was too radical departure from current state public policy. If in fact there has been a failed attempt to pass a Series LLC statute, the reasons for the failure of passage should be carefully explored prior to drawing conclusions that the internal shields of a Series LLC are against a state's public policy.

Indeed, in 2016 Virginia legislation was introduced to create Series LLCs.²⁴⁹ However, the Business Law Section of the Virginia Bar Association requested this legislation be deferred as it desired to wait on the Uniform Limited Liability Company Protected Series Act to be finished as well as there were some technical glitches in the draft legislation that appeared to be inconsistent with the Virginia Limited Liability Company Act.²⁵⁰ Opposition on such grounds is not based on Virginia public policy being adverse to internal shields or Series LLCs but the desire that the legislation that is passed be well thought out and consistent with other Virginia law. A rejection or deferral by the legislature of Series legislation on this basis may well be evidence that there is not a public policy objection to the concept of Series LLC nor internal liability shields. Indeed it is possible that the legislative history of a failed Series LLC effort may actually support the application of the Full Faith and Credit Clause and selection of the law of the foreign Protected Series doing business in such state.

Despite the favorable statutory activity with respect to statutory trusts and internal liability shields, there seems to be a preconceived response by many that somehow a single legal entity cannot or should not have internal liability shields.²⁵¹ As mentioned earlier, there is a belief by many that such an arrangement will lead to confusion and be a fertile ground for fraud and, therefore, the recognition of Series LLCs' internal shields should be opposed.²⁵² The statutory drafting committee of Maine, which decided not to provide for a Series LLC in its LLC statute, believed the Series LLC was too sophisticated for the average attorney.²⁵³ However, if a Protected Series is formed under the law of a state permitting Series LLCs, it can be used in Maine and implicitly the drafting committee for

248. *Kurz v. AMCP-1, LLC*, No. 1301, 2016 WL 547146, at *7 (Md. Ct. Spec. App. Feb. 10, 2016). The Appellant argued that the trial court created a Series LLC in its analysis and while the court rejected that analysis it also stated: "Second, we think Honey G-R puts far too much stock in the fact that the Maryland General Assembly has not adopted legislation authorizing the use of the series LLC form. While certainly true, to the best of our knowledge, the legislature hasn't even considered whether to adopt such legislation. It certainly hasn't done anything to suggest that adoption of the series LLC form will violate an important public policy." *Id.*

249. H.B. 130, 2016 Reg. Sess. (Va. 2016).

250. E-mail from Allan Donn of Willcox & Savage, P.C. to J. Leigh Griffith (Jan. 8, 2016) (on file with author).

251. Allen Sparkman, *supra* note 202, at 2 ("[T]he series within the LLC is not a separate entity under the laws of the state of Delaware.").

252. Justin T. Fezzi, *Third Time's A Charm: How the Uniform Law Commission Can Fit Series LLCs Into The Uniform Limited Liability Company Act*, 58 ST. LOUIS L.J. 911, 915-16 (2014) ("The largest contributor to [Series LLCs'] lack of growth has been the glut of uncertainties regarding the treatment of series LLCs . . . includ[ing] tax, bankruptcy, foreign recognition of limited liability and veil piercing, securities law, entity classification, non-uniform series statutes, and a lack of case law.").

253. ME. REV. STAT. ANN. tit. 31, § 1622(2)(J) (2011).

the Maine statute believed it should be respected in Maine.²⁵⁴ This history from the bar drafting committee may support the application of the Internal Affairs Doctrine and/or Full Faith and Credit Clause to a foreign Series LLC or its Protected Series doing business in Maine to support the internal liability shields and demonstrates that at least the committee did not think public policy or other doctrines would cause the Series LLC and its Protected Series to not enjoy the internal liability shields.

A state court without a statute specifically recognizing the internal liability shields of a foreign Series LLC should begin its analysis of whether to recognize Series LLCs created in a foreign jurisdiction by asking whether the state recognizes the series or cell concept with internal liability shields in other forms of entities. There may be case law concerning other forms of cell companies or trusts wherein the internal liability shields have been respected or rejected. The concept that a single legal entity can have cells or protected series with internal liability shields has heretofore largely been in specialized trust or insurance entities and is not commonly known or understood.²⁵⁵ However, the concept exists in the statutes of at least ten states in the context of statutory trusts and is found in the Uniform Statutory Trust Entity Act as approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws.²⁵⁶ The concept of internal shields did not appear to be controversial in that context.

The following states have Statutory Trust legislation (sometimes referred to as “business trust” or “investment trust”) that specifically recognize the internal liability shields of each series or cell within the Statutory Trust. Arguably, at least in these states, the concept of internal liability shields within an entity is clearly not per se obnoxious to public policy.

Table 6
Statutory Trust States With Internal Shields and Series LLC Legislation

State	Series LLC Legislation
CT ²⁵⁷	NO
DE ²⁵⁸	YES
DC ²⁵⁹	YES
KY ²⁶⁰	NO
MD ²⁶¹	NO

254. *Id.*

255. *See* Dawson, *supra* note 145, at 524 (“[T]he Delaware Code is silent as to whether a series itself is a legal entity form or rather a subpart of an overarching legal entity.”).

256. UNIF. STAT. TR. ENT. ACT § 309 (UNIF. LAW COMM’N 2009); presently, the Uniform Statutory Trust Entity Act has been enacted by Kentucky and the District of Columbia.. *See Act, Statutory Trust Entity Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Statutory%20Trust%20Entity%20Act> (last visited Jan. 24, 2017) . For information on states that have legislation that recognizes the internal liability shields of Protected Series, see *supra* tbl. 4.

257. CONN. GEN. STAT. § 34-502b (1998).

258. DEL. CODE ANN. tit. 12, §3801 (2016).

259. D.C. CODE § 29-1204.02 (2013).

260. KY. REV. STAT. ANN. § 386A.4-020 (2015).

261. MD. CODE ANN., CORPS. & ASS’NS, §§ 12-207(b); 12-501(d) (2010).

NV ²⁶²	YES
NH ^{263 264}	NO
SD ²⁶⁵	NO
VA ²⁶⁶	NO
WY ²⁶⁷	NO

It would appear that in Connecticut, Kentucky, Maryland, New Hampshire, South Dakota, Virginia, and Wyoming there is no per se public policy against internal liability shields. When these states plus the jurisdictions that have passed Series LLC enabling legislation are combined, at least 20 states for a total of 22 jurisdictions have stated public policy permitting series entities and internal liability shields of some sort. An analysis of the Statutory Trust states that have not enacted Series LLC legislation finds that two of the states limit Statutory Trusts to trusts that are registered investment companies or would be but for the application of specific provisions.²⁶⁸ The remainder are broader based investment and real estate trusts. There is no specific requirement to identify a series by a filing. In a manner similar to Delaware's Series LLC Act, the statutes uniformly provided that the trust certificate saying that one or more series may be formed and not requiring any indication that one was formed or how many were formed in the public filings was seen. No name restrictions were identified.

Conversely, Alabama has Series Trust legislation without a provision for internal limited liability shields for the series within in each trust.

State	Series LLC Legislation
AL ²⁶⁹	Yes

However, there is not a potential negative inference concerning limited liability internal shields for LLCs in Alabama given the fact that Alabama has enacted Series LLC legislation.²⁷⁰

If there is no statutory entity under the state's law providing for the series concept and no case law upholding or rejecting the internal limited liability shields in other contexts to influence the decision, the issue of whether to apply the law of the state of the Series LLC and its Protected Series organization or the law of the venue state would appear to be a case

262. NEV. REV. STAT. §§ 88A.280; 88A.380 (2015).

263. N.H. REV. STAT. ANN. §§ 293-B:8; 293-B:6 (2010).

264. Per N.H. REV. STAT. ANN. §293-B:6 (2010), the series only applies to investment trusts. New Hampshire defines an investment trust which is a registered investment company under the Investment Company Act of 1940, as amended by 15 U.S.C. § 80a-1, or which is otherwise excluded from the definition of investment company pursuant to section 3(c)(1), 3(c)(3), 3(c)(7) or 3(c)(11) of that statute.

265. S.D. CODIFIED LAWS §§ 47-14A-25(2); 47-14A-9 (2015).

266. VA. CODE ANN. §§ 13.1-1219; 13.1-1231 (2015).

267. WYO. STAT. ANN. § 17-23-106 (2015).

268. N.H. REV. STAT. ANN. § 203-B:6 (2010); WYO. STAT. ANN. § 17-23-106 (2015).

269. ALA. CODE § 10A-16-1.01 (2016).

270. This causes the authors to wonder if the Statutory Trust legislation as introduced did not contemplate protected series within such Statutory Trust or if Series LLC movement simply overcame any objections.

of first impression for the court. The fact that 22 jurisdictions (including 20 states) have enacted series type legislation (either Statutory Trust or Series LLC) may create a degree of comfort that there are not broad based public policy objections to such a structure and that applying the law of the foreign state may be appropriate.

The primary concerns that the authors have heard concerning Series LLCs are (i) the public will be confused and not understand they are dealing with a Protected Series and not the Series LLC itself and all of its associated Protected Series and (ii) unscrupulous parties will shift assets and liabilities around the different Protected Series to defraud and cheat those dealing with the Series LLC and the associated Protected Series. Presumably these also would be the areas of public policy concern of the states. These concerns should lead to a two part judicial analysis. The first being whether the public filings concerning the Series LLC and the associated Series are such that the public has the ability to have a similar understanding of the Series LLC and the associated Protected Series as the public would of a parent subsidiary chain of corporations or a group of commonly owned corporations or limited liability companies. The second is whether in fact there are books and records (preferably separate books and records) that properly identify the assets and liabilities of each Protected Series and the Series LLC and properly associate assets with the applicable Protected Series or the Series LLC. The books and records requirement in the Series LLC context is not simply the maintenance of books and records as well as in the parent subsidiary or commonly controlled corporation or LLC context, but rather per the existing Series LLC statutes to a degree that many believe to be a more stringent association test. Indeed, as will be discussed, the existing Series LLC requirements are more onerous for the proper association of assets than in the parent subsidiary group or affiliated group of commonly owned corporations and/or limited liability companies context. As a result the public should be better protected in the Series LLC context than in the parent/subsidiary context or by commonly owned groups of corporations and limited liability companies in those states in which public filings associating the Protected Series with the Series LLC are required to create the internal limited liability shields. Many states further reduce the possibility of misleading confusion by requiring the name of the Series LLC to be included in the name of each Protected Series and requiring the use of the same registered agent for the Series LLC and each associated Protected Series.

XIV. PUBLIC CONFUSION

To avoid or minimize the confusion to the public in dealing with entities or juridical persons such as Protected Series, a court may wish to analyze the transparency (public disclosure) surrounding the Series LLC and its linked²⁷¹ Protected Series as compared to a holding corporation and its subsidiaries or commonly controlled corporations or limited liability companies. Does the public have similar or greater official knowledge of the Series LLCs and the linked Protected Series as the public has for commonly controlled corporate groups or LLC groups? A court may investigate whether there is equivalent public information on file with the state of organization to meet the disclosure requirements for a

271. The authors are using the term "linked" to signify the relationship of the Protected Series to the Series LLC of which it is a part. To the authors' knowledge, there is no generally accepted term for this relationship.

corporation or limited liability company, whose existence would be respected under such state's law. Appendix I sets out the requirements for the corporate formation registration by state.

To form a corporation in Delaware requires very little disclosure above (i) the name of the corporation, (ii) name and address of incorporator, (iii) name and address of the registered agent, (iv) the purpose and nature of the corporation, (v) name and address of

each director, and (vi) number of shares.²⁷² Even with the limited public information, a Delaware corporation is honored in all jurisdictions.

The following table sets forth the requirements for forming a corporation vs. a Series LLC and its Protected Series in each of the six jurisdictions that require identification of the Protected Series.

Table 7
Comparison of Public Record to Form States Requiring Registration of Protected Series
State/JurisdictionCorporation Only

	DC	IL ²⁷³	IN	KS ²⁷⁴	MO	MT ^{275 276}	TX ^{277 278 279}	DE ²⁸⁰	NV ²⁸¹
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273. The registered agent and registered office for the Series LLC “in Illinois shall serve as the agent and office for service of process in Illinois for each” Protected Series. 805 ILL. COMP. STAT. 180/37-40(f) (2016).

274. The resident agent and registered office for the Series LLC “in Kansas shall serve as the agent and office for service of process in Kansas for each” Protected Series. KAN. STAT. ANN. § 17-76,143(f) (2015).

275. Montana Series LLC registration requires a list naming each Protected Series’ member(s) along with the individual operating agreements to the articles of incorporation.

276. The operating agreement of each series member(s) must set forth: (1) “if the limited liability company has one or more series of members, the operating agreement of each series of members in writing”; (2) if the limited liability company has one or more series of members, a statement of whether the debts or liabilities of any series of members are to be enforceable against the assets of that series of members only and not against the assets of another series of members or the limited liability company generally; (3) “if the limited liability company has one or more series of members, a statement setting forth the relative rights, powers, and duties of each series of members or indicating that the relative rights, powers, and duties of each series of members” will be set forth in the operating agreement or established as provided in the operating agreement. MONT. CODE ANN. § 35-8-202(h)–(j) (2016). (Note: the Montana statute uses the term series of members for Protected Series and refers to the Series LLC as a limited liability company.)

277. The secretary of state does not have a specific form to be used to create a Series LLC. Rather, the general certificate of formation for a limited liability company (Form 205) used and the Supplemental Text area of the form used includes additional required information under TEX. BUS. ORGS. CODE ANN. § 101.602(a)(1)–(2) (2009).

278. If any Protected Series of the Series LLC conducts business under a name other than the name of the Series LLC, the Series LLC must file an assumed name certificate (Form 503) for the name of the Protected Series in compliance with chapter 71 of the Texas Business & Commerce Code.

279. The Series LLC’s certificate of formation shall contain a notice 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, and shall not be enforceable against the assets of the limited liability company generally or any other series; and (2) none of the debts, liabilities, obligations, and expenses incurred, contracted

Name									
Corp	X	X	X	X	X	X	X	X	X
Series	X	X	X	X	X	X	X		
Protected Series	X	X	X	X	X				
Duration									
Corp			X		X		X		
Series		X	X		X	X	X		
Protected Series					X				
Street Address									
Corp		X	X	X	X		X	X	
Series	X	X		X		X			
Protected Series	X								
Name/ Address									
Registered Agent									
Corp	X	X	X	X	X	X	X	X	X
Series	X	X	X	X	X	X	X		
Protected Series	X				X				
Incorporator									
Organizer									
Corp	X	X	X	X	X	X	X	X	X
Series	X	X			X		X		

for, or otherwise existing with respect to the limited liability company generally or any other series shall be enforceable against the assets of a particular series." TEX. BUS. ORGS. CODE ANN. §§ 101.602(a)(1)–(2)–(b)(3) (2009).

279. The Series LLC's certificate of formation shall contain a notice 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, and shall not be enforceable against the assets of the limited liability company 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 limited liability company generally or any other series shall be enforceable against the assets of a particular series." TEX. BUS. ORGS. CODE ANN. §§ 101.602(a)(1)–(2)–(b)(3) (2009).

280. Per Annual Report

281. Optional

Protected Series					X				
Purpose/ Nature									
Corp		X		X			X	X	X
Series	X*	X			X		X		
Protected Series					X				
Name/ Address									
Director or Manager									
Corp				X			X	X	X
Series	X*	X				X	X		
Protected Series		X		X		X			
Other									
Corp									
Series	X	X	X	X	X	X	X		
Protected Series	X	X		X	X				
Authorized Stock			X					X	X
Certificate of Acceptance of Registered Agent									
Annual Report Requires listing of officers									X

*optional

When reviewing the above table, the Series LLC information and the Protected Series information should be aggregated as each Protected Series is linked to the Series LLC. Although Delaware may be a benchmark for comparison of the required information to

form a corporation versus the organization of a Series LLC and its Protected Series, the Delaware Series LLC is not listed in the table above as Delaware requires no information about any specific Protected Series or for that matter if any Protected Series actually exist with respect to a particular Series LLC. However, Delaware and Nevada requirements for formation of a corporation are listed for purposes of comparison, as they are popular states for corporate formations.

For the states that require the filing of the name of the Protected Series, the relevant information for the Series LLC and its Protected Series are similar to those required of a corporation. The number of shares is obviously irrelevant as Series and Protected Series do not have shares and the data point the states are trying to capture on authorized shares is information to impose a tax. The annual report information concerning Protected Series is minimal to non-existent.

As set forth in Appendix I, other states require more and a few require less information to be disclosed on public record, yet every state will recognize the existence and liability shields of corporations and limited liability companies within a commonly controlled group formed in any other state or states. Clearly very little public information is required to form separate corporations or limited liability companies and no information is required that would show an ownership relationship between or among separate corporations or limited liability companies.

Appendix II sets forth the public record requirements for the organization of a Series LLC and Protected Series in all 15 jurisdictions with Series LLC enabling legislation. These requirements can be compared to the corporate requirements of the reader's state as found in Appendix I. In addition, most of the enabling jurisdictions require some form of annual or biennial report. It appears, however, that very little information is required to be disclosed concerning the Protected Series or the associated members and officers, directors and managers of the Protected Series. Query, for the reports that require the identification of the managers, directors or officers, are the persons serving in such capacity for a Protected Series managers, directors or officers of the Series LLC? Appendix III presents in tabular form some of the annual report information required in each jurisdiction with enabling legislation. No jurisdiction has been identified that requires separate annual or biennial publicly available filings or detailed information on the Protected Series linked to the Series LLC. The lack of transparency as a result of the lack of annual or biennial report information may be troublesome to some courts.

A court may also examine what information is required for a foreign entity to qualify to do business in the particular state and whether the Protected Series (or the Series LLC if the Series LLC is doing business in the state or is required to file in order to qualify the Protected Series to do so in accordance with the procedures of the Secretary of State of such state) discloses such information in its qualification to do business filings with the particular state and/or in its organic documents (including those of the Series LLC) on file with the Secretary of State in its state of organization. Appendix IV presents in tabular form the requirements of a foreign Series LLC and its relevant linked Protected Series to qualify to do business in the states with enabling legislation plus Florida and Maine.

It appears almost all states, including (as Appendix IV indicates) most of those that have passed Series LLC enabling legislation, do not have a specific required mechanism for qualifying a Protected Series to do business by itself, but require the Series LLC to

register and qualify. Attorneys should consider identifying the specific Protected Series that will be engaged in business in the foreign state in the Series LLC's qualifications to do business in such state.²⁸² This is particularly true if the foreign state does not itself have Series LLC legislation specifically recognizing the internal liability shields of a Series LLC formed outside of such foreign state. If the Series LLC itself does not engage in business activity other than the creation and perhaps oversight of the Protected Series doing business in such foreign jurisdiction, a statement in the foreign qualification to do business that the Series LLC itself is not doing business in the foreign state, but is registering for the sole purpose of qualifying one or more Protected Series to do so should be considered. Further, if additional Protected Series contemplate doing business in a foreign state, an attorney should consider amending the Series LLC's qualification papers to identify each additional Protected Series prior to the time the Protected Series begins business in the foreign state. Finally, it should be noted that, as described in Series LLC–December 2013 update on Recent State Legislature and Taxation Developments,²⁸³ it appears that most states for income tax purposes follow the federal approach and treat each Protected Series as a separate income tax reporting entity.²⁸⁴ Although not controlling, such tax returns may assist in convincing a court that the Protected Series with its liability shields should be honored.

A court attempting to determine the public policy of its state concerning the appropriateness of an internal liability shield may also review the requirements for the formation of a corporation in the jurisdiction of organization of the Series LLC and compare the information therein to the information that is contained in public filings for the Series LLC and each of the Protected Series. This would indicate that an attorney qualifying a foreign Protected Series in a state should consider including such information in either (i) the organization documents on file in the state of organization or (ii) in the filings qualifying the Protected Series to do business in a state other than the state of organization.²⁸⁵ To avoid inadvertent omissions or failure to update such information if not specifically required in a foreign jurisdiction's qualification to do business, filing such information with the Secretary of State of the state of organization may be wise, as that will make such information easily available to any party doing a minimal amount of due diligence. This transparency may be a tactical disadvantage if there is a liability disagreement, but it should be a plus in a court's determination of whether to honor the internal liability shields.

In determining whether a state has a strong public policy against internal liability shields per se (ignoring the equitable remedies that would apply to commonly controlled groups of corporations to cause them to be liable for the debts and obligations of other commonly controlled corporations) the authors believe a court should do the following to

282. See *supra* notes 14–20 and accompanying text for a discussion of how to qualify a Protected Series LLC in a state without Series LLC legislation, specifically in Maine.

283. Griffith & Long, *supra* note 17, at 10–11.

284. Bruce P. Ely et al., *Update: Will the States Conform to Federal Classification of Series LLCs Once the Proposed Regulations Are Finalized?*, 20 TAX MGMT. WKLY. ST. TAX REP. 1, 2 (2013) (“[T]wenty-two (22) states so far have responded that they would follow the Proposed Regulations, once finalized, by classifying each series as a separate reporting entity that can make its own income tax election.”).

285. See app. I, IV, <http://www.ssm.com/abstract=2941725>.

determine if the Full Faith and Credit Clause and/or the Internal Affairs Doctrine should be honored and the potential application of the internal shields upheld: (i) determine if the state has other statutes permitting cells or internal shields, (ii) search the reported case law of the jurisdiction to determine whether the sister courts in the jurisdiction have found a per se public policy objection to internal shields of a trust or other cell entity sufficient to prohibit such internal shields per se and if so, why,²⁸⁶ (iii) determine if the legislature of the state has rejected series or cells in proposed legislation and if so why, and (iv) verify that the public filing disclosure for the Series LLC and the Protected Series doing business in the state is as robust or similarly as robust as that of (a) foreign corporations and/or limited liability companies qualifying to do business in the state or (b) corporations and/or limited liability companies created in the state. In the authors' view, such an analysis should be the foundation for a court's determination as to whether there is a sufficiently strong public policy against recognizing such Protected Series as a juridical entity with the internal shield limited liability protection under the full faith and credit clause.

If there are other entities recognized under the state's law as having internal liability shields, this fact itself may be easier for a court to determine that the foreign law of Series LLC organization is appropriate prior to examining the specific facts of the case before such court. The examination of the specific facts will determine if the Protected Series and/or Series LLC complies with the law of the state of organization for application of the Full Faith and Credit Clause, the Internal Affairs Doctrine, and/or and the general principles of law applicable to related entities in the state of venue.

Assuming the Internal Affairs Doctrine and/or Full Faith and Credit Clause applies or that the venue state will otherwise recognize the internal shield in concept, a court will still be required to examine the particular facts and circumstances in the case to determine (i) that the required books and records have been maintained for the Series LLC and/or the Protected Series involved, (ii) if the appropriate association of assets have occurred under the law of organization to permit the internal shields to be honored and (iii) whether judicial doctrines applicable to substantively consolidating separate entities for purposes of the liabilities and responsibilities apply to the Series LLC and the associated Protected Series under the specific facts.

At this time, all existing Series LLC statutes require the maintenance of books and records and the proper association of assets as a condition for the internal shields. In applying the Internal Affairs Doctrine and/or Full Faith and Credit Clause, the organizational filing requirements of the state of organization apply. Such requirements may or may not satisfy public policy disclosure requirements of the venue state in absence of statutory requirements for foreign Series LLCs and Protected Series. Just as in the state of organization, judicial and legislative concepts that permit or require separate entities to be treated as one for purposes of a liability or obligation should be analyzed in the context of the specific facts of the situation.

286. This is not merely an examination as to whether a sister court has found that the internal shields did not apply in a given situation, as there are reasons that internal shields should fail in specific circumstances (just as corporations can be combined on substantive consolidation or other equitable anti-fraud grounds). It is an examination as to whether sister courts found that such internal shields are per se invalid.

In light of the above, a Protected Series engaging in business in a state without Series LLC legislation should endeavor to have at least the equivalent information included in the filings to qualify the Protected Series to do business in such particular state as would be required to qualify a foreign LLC (and perhaps a foreign corporation) in such state or if there is Series LLC enabling legislation in such state the information required for domestic Series LLCs and their associated Protected Series. The authors believe that the public disclosure in either the qualification to do business in the foreign jurisdiction or in the public filings to create the Series LLC and Protected Series in the state of organization should approximate the applicable information that would be on record for a corporation or a limited liability company.

As indicated previously, it appears that almost all of the states without Series LLC legislation do not have a specific procedure for registering or qualifying a foreign Protected Series to do business in the particular state.²⁸⁷ Indeed, it appears that most states will not qualify a foreign Protected Series to do business in the particular state but rather qualify the Series LLC itself on the same basis as a regular limited liability company. As Appendix IV demonstrates, even in states that have passed Series LLC legislation, many do not have specific procedures for qualifying foreign Protected Series to do business in such state and require a filing by the Series LLC. In such case, if the Series LLC itself registers, attorneys should consider providing supplemental information for each Protected Series doing business in the state with such information equivalent to that required of a foreign LLC and if greater, consider adding the additional information required for a foreign corporation unless the state's foreign Series LLC statute specifically recognizes the internal liability shields of the foreign Series LLC.

Although the maintenance of appropriate books and records associating assets with a specific associated Protected Series or the Series LLC itself is a separate statutory requirement for the honoring of the internal liability shields, as a matter of public policy, courts may view the disclosure of all Protected Series associated with the Series LLC as a factor in demonstrating proper books and records or association. Other than perhaps through litigation and discovery, how is an injured party going to know to see if assets are properly associated if such party does not know of the existence of the other Protected Series?²⁸⁸ From a public policy standpoint, a court may conflate disclosure of the existence of other Protected Series with the requirement of association of assets. At a minimum, the lack of transparency of existence may be offensive in the view of a court and significantly contribute to the justification of overriding the Internal Affairs Doctrine and/or the Full Faith and Credit Clause as they apply to a foreign Protected Series or Series LLC engaged in business in the venue state or are otherwise subject to the law of the venue state.

287. Although the authors have not undertaken a survey of all 50 states, the only states without Series LLC enabling legislation that are known to have provided for registration of Protected Series with the Secretary of State are Florida and Maine. The state taxing authorities generally impose their income tax reporting requirements on Protected Series as if they were a separate limited liability company.

288. In the context of Series LLCs and Protected Series, attorneys for third parties should, as part of the standard discovery, inquire into the existence of other Protected Series. In the context of collecting on a judgment or entertaining a settlement based in part on ability to pay, seek an examination of the books and records of such other Protected Series and the Series LLC itself.

The authors recommend that in each state (or at least each state other than the state of organization and those whose statutes specifically recognize the internal liability shields of foreign Series LLCs) the same registered agent for service of process be used for the Series LLC and each linked Protected Series in a specific jurisdiction, particularly in the jurisdictions without Series LLC enabling legislation. Confusion as to whether service was made on the appropriate agent may be a short-lived tactical advantage if the court determines that because of the confusion, public policy is violated and the Series LLC and the Protected Series are one legal entity without internal liability shields.

By including in a public record all of the information required for any corporation or LLC formed in the state of organization for the Series LLC and each Protected Series, even if such information is more than is legally required, the attorney will have taken a major step of maximizing the likelihood that the Protected Series and its internal liability shields will be recognized in any foreign state that has or does not have enabling legislation for the Series LLC. The second step is to include, in a public record, all of the applicable information required to create and/or qualify a foreign corporation or LLC in the states the Protected Series plans on engaging in business.

With respect to contracts entered into by a Series LLC or a linked Protected Series, we recommend that the contract provide the laws of the state of the Series LLC organization (or Delaware), except conflicts of laws, will govern. This should be very beneficial in a contractual dispute. Requiring venue for disputes be in the state of organization would also be useful, but that is often much harder to accomplish. Controlling law is subtler but is very important.

XV. FOREIGN LLC RISK ANALYSIS AND TEMPLATE FOR JUDICIAL CONSIDERATION

As discussed above, at this point it is risky to assume that a state without Series LLC legislation will necessarily honor the internal liability shields. In the authors' view, it would be almost surprising if the Internal Affairs Doctrine itself will require the courts of a state to honor the internal liability shields of the state of the creation of the Series LLC when challenged by a third party. The application of the Full Faith and Credit Clause and choice of laws principles to Series LLCs in states with or without Series LLC enabling legislation when the internal liability shields of a foreign Series LLC or Protected Series are challenged in such state should be of great interest to both attorneys, their clients, and the courts grappling with the early cases in their state.

This Part sets forth an analytical framework for courts and attorneys to consider in determining if the concept of internal liability shields for Protected Series violates strong public policy requiring the law of the venue state to control. The early cases considering this matter will be very important both as to: (i) the specific facts; and (ii) the effectiveness of the attorney in raising of the proper policy considerations and how the Series LLC statutes and disclosure involved provide more than adequate third party protections and should not be seen as contrary to public policy of the venue jurisdiction. It will be critical that attorneys familiar with Series LLCs be involved in these early cases to properly educate the courts as to what Series LLCs and Protected Series are, the applicable public

policies involved, and hopefully be able to demonstrate that the particular Protected Series has complied with the public policy considerations of the foreign jurisdiction.²⁸⁹

At this point, from an internal shields perspective, there is no clear guidance for the analysis for a Series LLC to engage in business in a state without Series LLC enabling legislation. How the courts will analyze whether the state has a strong public policy that would warrant ignoring the applicable protections of the jurisdiction or organization and overriding either or both the Internal Affairs Doctrine or the Full Faith and Credit Clause is unknown. The determination as to whether the particular state has a strong public policy that would override the Internal Affairs Doctrine and/or Full Faith and Credit Clause is likely to be somewhat subjective—particularly in the initial cases. However, as discussed above, the authors believe the risk is reduced if the state without Series LLC legislation has Statutory Trust laws or other laws permitting internal liability shields for other entities. For a closely held business whose owners are unwilling or unable to form multiple entities to engage in multi-state activities and will only form one entity, the Series LLC will not provide less protection for the members than a single LLC (the Series LLC is a limited liability company) as there is no reason to believe that the external shields of the Series LLC and the associated Protected Series as a group will be any different in that respect from that of a regular LLC. The Series LLC is a form of LLC and LLCs are recognized in all United States jurisdictions. Indeed the Series LLC and the Protected Series may in fact ultimately provide more liability protection via the possible application of the internal liability shields than a single LLC, and certainly provides a better settlement position.

Presently, multi-state Series LLCs engaged in business in states without Series LLC enabling legislation may be more appropriate for regulated industries that do not use extensive debt with recourse other than to specific assets or directly undertake business operations where the losses are limited to the amounts invested such as mutual funds and other financial investments. These generally do not entail significant third party tort or contractual liability to the Protected Series. Other appropriate uses include a Series LLC composed largely of affiliated entities or persons that wish to use one legal entity. In this scenario, there is not a great concern about improper accounting by one Protected Series to take advantage of another Protected Series and a common desire to maintain the records to support the internal shields. In such cases, the parties are taking a business risk no greater than that of a single enterprise.

XVI. RISK MATRIX FOR PROTECTED SERIES DOING BUSINESS IN STATES OTHER THAN STATE OF ORGANIZATION

Based upon the above public policy considerations of states that have not passed enabling legislation for Series LLCs and the statutory language of the Series LLC statutes of the states that have passed Series LLC enabling legislation which do not specifically provide for the recognition of internal liability shields of a foreign Series LLC,²⁹⁰ the

289. See *Alphonse v. Arch Bay Holdings, LLC*, 548 Fed. App'x 979, 980 (5th Cir. 2013) (demonstrating the confusion of the Fifth Circuit on this issue).

290. The following jurisdictions Series LLC statutes specifically recognize the internal liability shields of foreign Series LLCs. District of Columbia (D.C. CODE § 29-105.01(a)(3) (2011)); Illinois (805 ILL. COMP. STAT.

authors believe the following tiers of risk apply for the honoring of internal liability shields (assuming the books and records and the association of assets are proper) for Series LLCs and Protected Series engaged in multi-state business, listed from safest to highest degree of risk.

1. First, the safest use of a Protected Series is to engage in business only in the state of the organization of the Series LLC and the Protected Series and in states that statutorily per se recognize the internal liability shields of a foreign Series LLC. In this category, the Series LLC and the Protected Series should not engage in business outside such states and should take steps to minimize activity that could give rise to litigation in other states. All contracts should provide that the law of the state of the Series LLC organization should be applied other than its choice of law provisions. Protected Series only owning and operating real estate in the state of organization would be an example— (i) each property has a fixed location in such state; (ii) multiple properties are often within a general geographic location and each could be placed in a separate Protected Series; (iii) generally minimal risk that litigation will occur in another state applying the laws of such other state, particularly if all significant contracts require the law of the state of organization controls; and (iv) books and records are highly likely to properly associate the assets to each Protected Series and the Series LLC in the ordinary course of business.

2. Second, the next safest use of Protected Series is to only engage in business in states that have passed Series LLC enabling legislation with public filing/disclosure requirements equal to or less than those of the state of organization of the Series LLC and its Protected Series or which have statutorily recognized the internal liability shields of foreign Series LLCs. The qualification to do business in each such foreign state should be timely filed and attempt to place in the record the identity of each Protected Series that is doing business in such foreign state or which is anticipated to do so.

3. Third, the next safest use of Series LLCs and Protected Series is to only engage in business in states that have passed Series LLC enabling legislation regardless of the required public filing disclosure for Series LLCs and Protected Series created under that state's laws. Again, the qualification to do business in each such foreign state should be timely filed and attempt to place in the record the identity of the Protected Series that is doing business in such foreign state or which are anticipated to do business in such foreign state.

4. Fourth, attorneys could use the Series LLCs and Protected Series to only engage in business in states that have passed (i) Series LLC enabling legislation recognizing the internal liability shields or (ii) enabling legislation for other entities (such as Statutory Trusts) that honor internal liability shields.

5. Fifth, a less safe use of Series LLCs and Protected Series is to engage only in business in states that have (i) passed some form of Series LLC or other entity enabling legislation recognizing the internal liability shields or (ii) not considered and failed to pass Series LLC or other legislation proposing internal liability shields.

180/37-40(o) (2007)); Kansas (KAN. STAT. ANN. § 17-76,143(o) (2012)); Missouri (MO. REV. STAT. § 347.186(6)(2) (2013); and Oklahoma (OKLA. STAT. § 2054.4(M) (2014)). Effective January 1, 2017, Indiana will recognize the internal liability shields of foreign Series LLCs. IND. CODE § 23-18.1-1-1 (2016).

6. Sixth, a very aggressive and uncertain use of Series LLCs and Protected Series from an internal liability shield perspective is to engage in business in any state or territory (other than California, Minnesota, North Dakota, or Wisconsin) regardless of whether Series LLC or other enabling statutes have been passed, proposed, or rejected. This may be appropriate primarily for Series LLCs of financial products such as unleveraged mutual funds where there is minimal chance of tort or contractual liability that would exceed the assets of the particular Protected Series. It may also be appropriate in cases where the owners are unwilling or unable to conduct business in multiple legal entities such as an affiliated group of LLCs to utilize a Series LLC as the uncertainty of the application of the law to the internal liability shields will be considered in any litigation and may lead to a more favorable settlement for the Protected Series directly involved and the Series LLC and the other Protected Series.

7. Seventh, the most aggressive and highest risk use of Series LLCs and Protected Series from an internal liability shield perspective is to engage in activities giving rise to a venue in California, Minnesota, North Dakota, or Wisconsin. These states all have a form of Series LLC legislation but without the internal liability shields. The application of their law and perhaps public policy to a situation will not auger well for the other Protected Series or the Series LLC and is likely to seriously upset the members associated with the other Protected Series that have no connection to the claim or dispute other than the potential of having assets at risk.

XVII. STATUTORY ASSOCIATION REQUIREMENTS FOR THE HONORING OF THE INTERNAL LIABILITY SHIELDS OF SERIES LLCs AND PROTECTED SERIES

Maintaining accurate books and records (often discrete books and records are required) and associating assets with each specific Protected Series and the Series LLC itself is a precondition for the internal liability shields in all existing statutes. The statutory requirement of association should provide much more protection and disclosures for third parties interacting with a Protected Series than is provided to third parties in the common parent/subsidiary or controlled group of corporations and LLC scenarios. In the absence of indications of fraud and affirmative attempts to mislead parties dealing with a controlled group, it is difficult to successfully seek recovery for the actions of one corporation or LLC from assets of the other corporations or LLCs, even if commonly owned with respect to the actions of one of the companies.²⁹¹ Poor records in the brother/sister corporate scenario may be a part of the basis for substantive consolidation of the two or more entities if the third party claimant can identify and show the improper maintenance or records between or among such entities.²⁹² However, in the case of parent/subsidiary chains of business entities or other groups of business entities with common ownership, poor record keeping and accounting, by itself, is not sufficient to cause substantive consolidation, which would

291. Joy E. Mason, *The Impact of Substantive Consolidation in Bankruptcy*, 27 L.A. LAW. 18, 20 (2014), (“[P]roponents of substantive consolidation who base their argument solely on accounting problems are seldom successful, due to the high standards to which courts hold proponents of consolidation.”).

292. *Id.* (noting that “courts have granted substantive consolidation on the grounds that the financial records and affairs of the debtors were so entangled that to untangle them would jeopardize any recovery to creditors”).

permit the creditor of one corporation to reach the general assets of another corporation.²⁹³ Further, in the absence of active participation by a second corporation, an injured party may never know there is a brother or sister corporation and may never investigate the possibility of substantive consolidation or other equitable remedies.²⁹⁴ There is generally no central repository of public records that will necessarily indicate the common owner relationship, although there will be a bare public record evidencing the existence of such corporation or LLC but not the relationship.²⁹⁵

In contrast, the failure to associate assets of the Series LLC and its linked Protected Series is fatal to the internal liability shields either to the unassociated assets²⁹⁶ or a total collapse of the internal shields among the Protected Series and Series LLC with the improper associations. Nothing more is required. In the corporate context, the burden of establishing substantive consolidation is much greater than simply demonstrating that the records do not clearly associate the assets of each corporation²⁹⁷ and there is much greater latitude for unscrupulous and crooked parties to improperly shift assets among commonly controlled corporate or regular LLCs than Series LLCs and Protected Series formed under state statutes requiring public filings of the identity of each Protected Series. However, in Delaware and other states that do not require each Protected Series to be of public record, the existence of the other Protected Series (or brother/sister corporations in the corporate context) may or may not be uncovered absent litigation and discovery in which appropriate questions are asked.²⁹⁸ Since such unscrupulous and crooked actors would make it very difficult to determine that some entities are related to others through common ownership of corporations or traditional LLCs, there may not be a lot of difference between no public record disclosure of the existence of a Protected Series and a bare public record disclosure of a corporation or LLC's existence (along with several hundred thousand or more similar entities) without any indication of common linkage. Nevertheless, the optics of undisclosed Protected Series are very bad. As stated previously, maintenance of books and records with such records clearly associating assets are a prerequisite for the internal limited liability

293. *Id.* at 18 (“Substantive consolidation threatens to prejudice the rights of creditors because separate debtors ordinarily will have different ratios of assets to liabilities (or levels of solvency).”).

294. In states such as Delaware that do not require disclosure of individual Protected Series, the series could remain unaware of each other. *See* DEL. CODE ANN. tit. 6, § 18-215 (2016).

295. *See id.* (example of a state without a central public record of series LLCs).

296. The current draft of the Limited Liability Company Protected Series Act calls for a loss of internal shields for any asset that is not properly associated, but not a loss of internal shields of Protected Series with respect to properly associated assets. In essence, if not properly associated, the asset is fair game for any creditor. However, no presently passed enabling statute applies an asset-by-asset approach to the failure of the internal liability shields. *See generally Limited Liability Company Protected Series Act*, NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS, http://www.uniformlaws.org/shared/docs/series%20of%20unincorporated%20business%20entities/2016AM_LLCProtectedSeries_Draft.pdf, (last visited Feb. 10, 2017).

297. Harner et al., *supra* note 10, at 3 (“In the series LLC context, a substantive consolidation analysis may not only consider the applicable state statute and relevant operating agreements but also how the master LLC and the series conduct themselves in practice.”).

299. For example, in *AVIS Rent A Car Systems, LLC v. Holly*, the plaintiff was unaware that the defendant was organized as a Series LLC until a hearing on defendant’s Motion to Dismiss for Lack of Personal Jurisdiction. *AVIS Rent A Car Systems, LLC v. Holly*, C.A. No. CPU4-13-001143, 2013 WL 5436759, at *2 n.1 (Del Com. Pl. Sept. 27, 2013).

shields between and amount the Series LLC and the various linked Protected Series in all of the existing Series LLC statutes.²⁹⁹ The failure of the books and records to associate assets with the Protected Series will collapse the internal liability shield of a Series LLC with respect to such Protected Series, either completely or with respect to the assets that are not clearly associated.³⁰⁰ These requirements place the plaintiff in a substantially better position than discovering common ownership of the commonly controlled corporations and LLCs with poor accounting records.

This collapse of the internal shields will occur whether or not the third party was misled or the requirements for substantive consolidation were met.³⁰¹ Indeed, the risk of internal liability shield collapse as a result of the failure to maintain books and records and to properly associate assets with the respective Protected Series or the Series LLC itself is a reason for investors and businessmen to avoid Series LLCs, unless they are highly confident that the accounting records will (i) be complete and accurate and (ii) properly associate all assets. A public record for Protected Series created under statutes requiring registration to have internal liability shields will exist which ties the Protected Series to the Series LLC and the other protected Series.³⁰² A public record will likely also exist for Protected Series created in those states that require a filing identifying such Protected Series even if such filing is not a pre-requisite for internal liability shields. Protected Series formed in each of these states easily would be able to be identified with the Series LLC without the need for extensive discovery. In addition, when multi-state operations are contemplated, the authors recommend each Protected Series created be identified in filings associated with the Series LLC whether or not required by the applicable statute. While this recommendation should maximize the likelihood that a foreign state without Series LLCs will honor the internal liability shields if a problem develops in such foreign state, it does lay out all of the potential places assets may exist to satisfy a claim if there is a failure to properly associate the assets. Therefore, with such disclosure, the ability to determine the interrelationship of the Series LLC with its Protected Series and overall creditor (judgment or contractual) should be greater than in the corporation or regular LLC context.

XVIII. CONCLUSION

Whether the Series LLC is a “flash in the pan” with limited acceptance or a long term viable form of business entity is yet to be determined. The Illinois hard data indicates it is a long-term viable form of business entity or it is a very big pan with a very big flash. The authors believe that creative legal minds will find legitimate uses for Series LLCs to meet the business needs of their clients as time goes on and the law becomes settled. Certainly, the common use of LLCs in the public corporate setting was not foreseen by most at the outset. The acceptance of Series LLCs may well follow the path of regular LLCs, although

299. DEL. CODE ANN. tit. 6, § 18-215(b) (2016).

300. Bond & Sparkman, *supra* note 163, at 71–72.

301. Although the collapse of the internal liability shields should, in the opinion of the authors, only affect the Protected Series with the inadequate books and records and, if applicable, the Series LLC itself (independent from its Protected Series), the law is not entirely clear at this time with respect to the District of Columbia.

302. See Illinois’s Series LLC statute as an example of a state that requires a completely separate filing for each Protected Series. 805 ILL. COMP. STAT. ANN. 180/37-40(b) (2016).

at this time, the contextual uncertainty regarding internal liability shields appears to have stalled their use around the country.

Passage of Series LLC legislation by a critical mass of states may moot many of the state law concerns about the use of Protected Series in foreign jurisdictions, much like the debate over LLCs in the early 1990s as discussed above. The U.C.C. and bankruptcy issues will likely be resolved. NCCUSL's drafting committee for the Uniform Limited Liability Company Protected Series Act is currently developing a set of uniform provisions for Series LLCs and their Protected Series.³⁰³ There is a significant debate on the Drafting Committee as to foreign Series LLC and foreign Protected Series public filings as a condition for being permitted to qualify to do business in a state. The optical advantages of identifying each Protected Series, listing the Series LLC and Protected Series on titles of titled assets, or requiring the name of each Protected Series to contain the name of the Series LLC along with Series information is starting to be understood as well as the benefit of common registered agents to minimize the public confusion. Such provisions should go a long way to easing public policy concerns while not imposing a significant burden on the Series LLC or the linked Protected Series. A uniform law by NCCUSL or a thought-through model act should aid states in developing consistent statutes and addressing various policy concerns. As substantively adopted by a number of states, the statutes will become more uniform and clearly address public policy concerns. Attorneys and courts will have fewer potential concerns about a Protected Series of a Series LLC formed in one state doing business in a second state that has passed Series LLC legislation. In addition, the public policy arguments may be muted as it becomes clear that states do not have a concern about internal liability shields, particularly if the Protected Series are "on record" and clearly linked to the Series LLC.

As discussed, the major impediment to broader acceptance of Series LLCs at this time appears to be concerns about the integrity of the internal liability shields in states without Series LLC enabling statutes and the wide differences in the requirements of identifying the Protected Series and the titling of assets. Caution by lenders continues to be a significant business detriment to the usage of Series LLCs until the U.C.C. issues are better resolved, but Series LLCs are presently borrowing money from some banks and other lending institutions. Clarity as to the ability of a Protected Series to file for bankruptcy without the Series LLC itself being required to file is also needed, and it is expected this will develop in the near future, as there is already somewhat favorable precedent in Massachusetts by the court's acceptance of the filings of protected series, although the issue of standing was not apparently raised at the outset.³⁰⁴ While most new businesses do not form and plan for bankruptcy, an attorney is often concerned about such matters. Finally, while the Proposed Treasury Regulations have reduced the stress for most concerning federal income taxation,

303. *Limited Liability Company Protected Series Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Committee.aspx?title=Limited%20Liability%20Company%20Protected%20Series%20Act> (last visited Jan. 23, 2017) (outlining a discussion of the NCCUSL's latest activity on this uniform law).

304. See generally *In re Crush Real Estate Series LLC Sole Beneficiary of 917 East Broadway Realty Trust*, No. 1:15-BK-12105 (Bankr. E.D. Mass. May 28, 2015) (Chapter 11 voluntary petition); *In re Crush Real Estate Series LLC Sole Beneficiary of 427 East Sixth Street Realty Trust*, No. 1:15-BK-10237 (Bankr. E.D. Mass. Jan 22, 2015) (Chapter 11 voluntary petition); *In re Crush Real Estate Series LLC Sole Beneficiary of 427 K Street Realty Trust*, No. 1:15-BK-12106 (Bankr. E.D. Mass. May 28, 2015) (Chapter 11 voluntary petition).

employment taxes and the appropriate state taxation of the Protected Series, particularly in the non-income tax areas, continue to be confusing. Texas's outlier position of applying its taxes to the Series LLC and all of its linked Protected Series makes the utilization of Texas Series LLCs somewhat problematic and engaging in business in Texas using Series LLCs a bit more dicey on the tax front. Texas in essence pierces the internal liability shields for its taxes and a foreign state in which a Texas Series LLC or a linked Protected Series will probably have the same piercing power.

If the Protected Series' internal liability shields are honored as a matter of law and the books and records are appropriately maintained, in the absence of activities that indicate a fraud on the plaintiff, the specific prohibition of one Protected Series' assets being subject to the liabilities of another would seem to make piercing the "corporate veil" within the Series LLC and among the linked Protected Series very difficult. In all cases, however, the members associated with each Protected Series and/or the Series LLC itself should have the limited liability protection of an LLC, as all of the Series LLC statutes are found within the general LLC statutes and generally are overlay provisions to the general LLC statutes. A failure of the internal liability shields should not lead to a failure of the external liability shields for the members, but will rather place the Series LLC in the same position as a regular LLC. This situation will obviously not be satisfactory for members associated with a Protected Series not involved in the issue giving rise to the liability and not participating in the economics of the offending Protected Series. For commonly owned enterprises in multi-state businesses where multiple entities are not practical, the Series LLC does not appear to have significant drawbacks, and offers potential protection.

All in all, there are now legitimately several tens of thousands of Series LLCs and Protected Series, over 25% of the states have adopted Series LLC legislation, and 40%³⁰⁵ of the states have either Series LLC legislation or recognize Statutory Trusts with internal liability shields. The possibility of a Uniform Limited Liability Protected Series Act or at least a model act entering the picture should cause more states to take notice of the Series LLC Act and perhaps cause some of the states with an existing Series LLC Act to review its enabling statute to make the laws more uniform and more likely to be supported when foreign Series LLCs and their linked Protected Series engage in business in states without Series LLC enabling legislation. The massive growth of Series LLC organization in Illinois and exponential growth in Tennessee clearly demonstrates there is a business demand for such entities. Series LLCs are now entities with which both attorneys and courts should become more familiar.

305. This includes Indiana, whose Series LLC law was not effective until January 1, 2017. IND. CODE § 23-18.1-1-1 (2016).