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THE SERIES LLC – THE NEXT FRONTIER

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BIOGRAPHICAL INFORMATION

Gene Wolf is a native El Pasoan. He earned his B.B.A. from Baylor University in 1988 and his J.D. from Baylor School of Law in 1991. He began practicing law at Kemp Smith LLP as an associate in 1991 and has been a partner since 1997. Gene is currently a member of the Business Department with practice emphasis on tax, estate and business planning, and is a member of the Firm's Management Committee. Gene currently serves as Managing Partner of the Firm. His specialties are corporate, business, tax and estate planning. Since 2012, Gene has served on the Board of Directors of Hunt Companies, Inc. and as chair of the Governance and Nominating and Ethics Committee. Gene is a Fellow in the American College of Trust and Estate Counsel (ACTEC) and is Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law. Gene is the current President of the Texas Federal Tax Institute, which brings together leading corporate, partnership and real estate tax professionals from across the United States and is regarded as the premier federal tax event in the Southwest. Gene is a member of the Taxation Sections of the American Bar Association, the State Bar of Texas and the El Paso Bar Association. Gene is Past Chair for the Section of Taxation of the State Bar of Texas and Past Editor of the *Texas Tax Lawyer*, the publication of the Section of Taxation of the State Bar of Texas. Gene has been recognized by the publishers of Law & Politics and Texas Monthly as a "Texas Super Lawyer" since 2007 and he has been recognized since 2006 as one of the "The Best Lawyers in America" in the sections of Tax Law and Trusts and Estates. In 2012, Gene was honored with the distinction of El Paso *Best Lawyers* "Tax Law Lawyer of the Year." He is qualified to practice in Texas, the Supreme Court of Texas, the United States District Court (Western District of Texas) and the United States Tax Court.

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The future of business entities is here with the series limited liability company (“**Series LLC**”). A Series LLC is a limited liability company that is permitted to establish one or more series. Generally, a series is not recognized as a juridical or separate entity under state law even though each such series is recognized as an enterprise separate from each other series and from the Series LLC itself. Further, each series may have associated with it specified members, managers, assets, and obligations that are different from any other series and different from the Series LLC itself.

This paper is intended to introduce the reader to the domestic series statute. The articles referenced in Part VIII of this paper provide the reader with more in-depth analysis.

I. Historical Background

It appears that the series concept can trace its roots to statutory trusts.² Statutory trusts have been used historically by investment companies. One principal advantage offered by statutory trusts is a trustee’s ability to segregate assets within a single trust. By segregating assets, the trustee, through a single entity, could separately manage each tranche of assets and create different investment securities that track the economic performance of particular tranches of assets while excluding others. In other words, by using a statutory trust, a business owner has the ability to create different tranches or series of owners, managers, and assets that are different from any other tranche or series of that particular trust and from the trust itself. Notwithstanding this flexibility, operating businesses have not embraced statutory trusts. It was against this background that the Delaware Legislature in 1996 incorporated the series concept into both its limited partnership statute and its limited liability company statute.³

II. Domestic Series Legislation

The series concept is something that has split the legal community. While some attorneys recognize the potential benefits of the Series LLC, other attorneys are skeptical about the value of the structure.⁴ As of October 2017, the District of Columbia, Puerto Rico, and the following 13 states have adopted a series statute: Alabama, Delaware, Illinois, Indiana, Iowa, Kansas, Missouri, Montana, Nevada, Oklahoma, Tennessee, Texas, and Utah.⁵ In addition, the American Bar

¹ Special thanks to Gregory Martin, an associate at Kemp Smith LLP, for preparing this paper.

² James Howard, *Where Do We Go From Here? A Survey of Series LLCs in Texas in Light of the Proposed Federal Tax Classification for the Organization*, 63 BAYLOR L. REV. 850, 851-5 (2011).

³ See DEL. CODE ANN. tit. 6, §§ 17-218, 18-215.

⁴ See Vicki R. Harding, *Series LLCs: A Wave of the Future – Or Not*, 27 MICH. BUS. L.J. 19, 21 (Spring 2007); see also *infra* note 365.

⁵ ALA. CODE § 10A-5A-11.01; DEL. CODE ANN. tit. 6, § 18-215; 805; D.C. CODE § 29-802.06; ILL. COMP. STAT. 180/37-40; IND. CODE § 23-18.1; IOWA CODE § 489.1201; KAN. STAT. ANN. § 17-76, 143; MO. ANN. STAT. §§ 347.039, 347.153, 347.186; 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; NEV. REV. STAT. § 86.296; OKLA. STAT. tit.18 § 2054.4;

Association's Revised Prototype Limited Liability Company Act, which was published in 2011, includes series provisions even though series provisions were not included in the Revised Uniform Limited Liability Company Act adopted five years earlier.⁶ The National Conference of Commissioners on Uniform State Laws Drafting Committee began working on the issue of Series LLC legislation in May 2011,⁷ and at its July 19, 2017 annual meeting approved the "Uniform Protected Series Act" and recommended it for enactment in all the states.⁸

California, Minnesota, North Dakota and Wisconsin appear to have adopted some form of series or class statute that permits the segregation of assets, liabilities, and owners; however, these statutes do not appear to provide the internal liability protection among series that is the defining characteristic of the Series LLC legislation discussed in this paper.⁹ Finally, even though California, Maine and Florida do not have Series LLC legislation, these states allow for the registration of a foreign Series LLC in their respective jurisdictions.¹⁰

III. What is a Series LLC?

A. Segregation of Rights, Powers, and Duties

The limited liability company is a creature of statute. It extends the corporate benefit of limited liability to all of its members while providing the structuring flexibility historically available only through a partnership. The Series LLC retains all of the benefits associated with a traditional limited liability company and adds to those benefits the ability to establish one or more series of members, managers, membership interests, or assets under which each such series may have:

- separate rights, powers, or duties with respect to specified assets;
- separate rights, powers, or duties with respect to specified obligations;

P.R. LAWS ANN. tit. 14 § 3967; TENN. CODE ANN. § 48-249-309; TEX. BUS. ORGS. CODE ANN. §§ 101.601, 101.622; UTAH CODE ANN. § 48-3a-12.01.

⁶ Compare REVISED PROTOTYPE LIMITED LIABILITY COMPANY ACT § 1101, Comment (Revised Prototype Limited Liability Company Act Editorial Board, LLCs, Partnerships and Unincorporated Entities Committee, Business Law Section, American Bar Association 2011) ("ABA Prototype Act") with REVISED UNIFORM LIMITED LIABILITY COMPANY ACT (National Conference of Commissioners on Uniform State Laws 2006).

⁷ [http://www.uniformlaws.org/Committee.aspx?title=Protected Series Act](http://www.uniformlaws.org/Committee.aspx?title=Protected%20Series%20Act).

⁸ http://www.uniformlaws.org/shared/docs/series%20of%20unincorporated%20business%20entities/2017AM_ProtectedSeries_AsApproved.pdf.

⁹ See CAL. CORP. CODE §§ 17703.04, 17712.01 (The California statute does not use the word series but provides for classes of members having relative rights, powers and duties senior to other classes of members.) MINN. STAT. § 322B.03, subd. 44; N.D. CENT. CODE § 10-32-02.55; WIS. STAT. § 183.0504.

¹⁰ See CAL. CORP. CODE § 177038.01; 31 ME. REV. STAT. § 1622; FLA. STAT. ANN § 605.0902. Though California recognizes foreign Series LLCs, its Franchise Tax Board takes the position that each series is a separate entity for franchise tax purposes. <https://www.ftb.ca.gov/businesses/structures/series-limited-liability-company.shtml>.

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First appeared as part of the conference materials for the
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"Choice of Entities: When to S Corporation, When to LLC, When to FLP, and Why"