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THROUGH THE LOOKING GLASS—SERIES LLCs IN 2016

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ABSTRACT

This Article examines series LLCs in an effort to explain how the series concept developed, what potential uses for the series concept exist, the potential problems the series concept raises, and what improvements should be considered. This Article first looks at the history of the series concept as it developed in the fund area with business trusts, and then reviews the series provisions of the Delaware LLC Act and the series provisions of the laws of other states. In connection with that review, this Article addresses the question of whether a series is treated as a separate state law entity and, if so, what the meaning and significance of that treatment may be. Certain actual and potential uses of series LLC are examined, and this Article then addresses certain legal uncertainties with respect to series LLCs. Following a look at the few cases that have been decided involving series LLCs, this Article concludes with some recommendations and cautions.

The author serves as an ABA Advisor to the Drafting Committee of the National Conference of Commissioners on Uniform State Laws (the NCCUSL Drafting Committee) that is preparing a Uniform Limited Liability Company Protected Series Act.¹ The NCCUSL Committee's latest Discussion Draft (the "NCCUSL Discussion Draft") is dated March 2016.² Despite the reservations raised in this Article, innovation in the law is a positive development. When a new legal concept is introduced, it is incumbent on the profession to do all it reasonably can to improve the concept and to provide guidance on how the new concept can best be employed to assist clients in reaching their goals.

1. The author is also co-chair of the task force on model series LLC operating agreement of the LLCs, Partnerships, and Unincorporated Entities Committee of the Business Law Section of the American Bar Association.

2. <http://uniformlaws.org/Committee.aspx?title=Limited%20Liability%20Company%20Protected%20Series%20Act>. The NCCUSL Discussion Draft is still being reviewed. Anyone who has an interest should download the NCCUSL Discussion Draft and email any comments to Steve Frost at frost@chapman.com.

I. INTRODUCTION

A. Origin of Series Concept

The series concept arose in Delaware. Delaware adopted its Business Trust Act in 1988 (changed to Statutory Trust Act in 2001).³ Series provisions were added to the Delaware Business Trust Act in 1990 at the urging of the mutual fund/investment company industry; those series provisions afforded internal liability shields only to registered investment companies.⁴ The 1990 amendments added the following language to § 3806(b) of what was then the Delaware Business Trust Act:

(b) A governing instrument may contain any provision relating to the management of the business and affairs of the business trust, and the rights, duties and obligations of the trustees, beneficial owners and other persons, which is not contrary to any provision or requirement of this chapter and, without limitation:

(2) May establish or provide for the establishment of designated series of trustees, beneficial owners or beneficial interests having separate rights, powers or duties with respect to specified property or obligations of the business trust or profits and losses associated with specified property or obligations, and, to the extent provided in the governing instrument, any such series may have a separate business purpose or investment objective[.]⁵

In addition, the amendment added the following to the end of § 3804 of the Delaware Business Trust Act (with some ancillary language that was deleted in 1991 omitted):

Notwithstanding the foregoing provisions of this § 3804, in the event that the governing instrument of a business trust which is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. § 80a-1 et seq.) creates one or more series as provided in § 3806(b)(2), and if separate and distinct records are maintained for any such series and the assets associated with any such series are held and accounted for separately from the other assets of the business trust, or any other series thereof, and if the governing instrument so provides, and notice of the limitation on liabilities of a series as referenced in this sentence is set forth in the certificate of trust of the business trust, then the

3. DEL. CODE ANN tit. 12 § 3801(g) (West 2012).

4. Memo from Marla Norton, Director and Shareholder of Bayard, P.A. in Wilmington, Delaware, to the NCCUSL Drafting Committee (copy on file with author).

5. 67 Del. Laws, c. 297, § 4 (1990).

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