SERIES LLC AND BANKRUPTCY: WHEN THE SERIES FINDS ITSELF IN TROUBLE, WILL IT NEED ITS PARENT TO BAIL IT OUT?

ABSTRACT

Series Limited Liability Companies offer a unique system of internal liability protection and numerous means for cost savings. Despite having been created over a decade ago, these entities are rarely used by the business and legal community. Much of this hesitation can be attributed to the fact that there is very little legislative and judicial guidance on the series LLC, leaving many vital questions unanswered and making the series LLC a risky investment. One question that has yet to be determined is whether an individual series will be permitted to file for bankruptcy in its own name. This issue is important in holding steady the internal liability shield of the series LLC because only by filing separately from the master LLC and its fellow series can creditors in bankruptcy be limited solely to the assets of the individual series, as was intended by the statute.

I. INTRODUCTION

Limited liability companies (LLCs) have become a fixture of the Delaware business market. LLCs continue to dominate as the choice entity form for new businesses.1 The affinity towards this business format is understandable given its corporate-like liability protection and its partnership-like tax advantages.2 Another attractive feature of the LLC is its contractual flexibility. For example, parties have the ability through the LLC agreement to loosen managerial responsibilities or alter voting rights.3


2See DEL. CODE ANN. tit. 6, § 18-303 (2006); Treas. Reg. §§ 301.7701-1 to -4 (as amended in 2009).

Yet perhaps the most attractive feature of LLCs is the ability to limit or even eliminate fiduciary duties.\(^4\) Expectedly, LLC statutes have continued to evolve into 2010. One noticeable evolution, which commenced in the state of Delaware in 1996, was the creation of the series LLC (SLLC).\(^5\)

In an SLLC, the LLC (thought of as a parent or master LLC) is essentially subdivided into separate classes, referred to as series, which may have separate members, managers, interests, and business purposes.\(^6\) In addition, the statutes typically provide that an individual series is allowed to hold assets in its own name and contract for its own debts and obligations. Those contracts may limit debts and liabilities strictly to the assets contained within a series.\(^7\)

The internal structure of an SLLC provides several benefits to the owners. First, only one certificate of formation needs to be filed with the secretary of state for all of the series within the LLC.\(^8\) A multiple entity approach requires state filing fees to be assessed each time a new entity is created, and consumes time as members wait for the paperwork to fall into line.\(^9\) An SLLC provides an efficient avenue to avoid this administrative hassle. Second, commonality among the series may also reduce administrative costs and burdens associated with establishing and maintaining several LLCs, such as needing to hold only one shareholder or member meeting despite having several entities.\(^10\) While these costs may

\(^4\) Id. § 18-1101(c). The parties may not limit or restrict the implied contractual covenant of good faith and fair dealing. Id.


\(^7\) Id.

\(^8\) See id. (noting the reduced administrative burdens associated with an SLLC as compared to multiple LLCs).

\(^9\) Amending the schedules of an already existing operating agreement and applying for an EIN would seem like a faster and easier approach. This should also result in a reduction of legal fees as it does not take as much time to amend a schedule as it does to create a new operating agreement.

\(^10\) See James M. Peaslee & Jorge G. Tenreiro, Tax Classification of Segregated Portfolio Companies, TAX ANALYSTS (2007), available at http://www.taxanalysts.com. The authors offered a simple way of characterizing the advantages of the SLLC: "[i]t is better to form a company once rather than 100 times." Id.; see also Steven E. Grob & Norman J. Hannawa, Federal Tax Status of a Series Limited Liability Company, BUS. ENTITIES, Mar.-Apr. 2008, at 24, 24 (stating that "[t]he basic concept of an SLLC is that its single operating agreement establishes separate series similar to separate LLCs, each with its own objectives, voting rights, management, and liability"). Another interesting advantage which could accrue to SLLCs if they are afforded separate tax status among their series would be the use of a series to implement an internal change in the method of accounting, by transferring existing operations to a new series. See Glenn Walberg & Randall K.
seem small relative to other expenses, they can become quite substantial for small business owners who need multiple separate LLCs.

Despite the fact that the SLLC could offer a substantial reduction in costs and efforts for business owners, it has not garnered much use in the business world, due mainly to the uncertainties surrounding the entity.\textsuperscript{11} For example, there is no authority on how SLLCs will be treated in jurisdictions without series statutes,\textsuperscript{12} or whether the SLLC's limited liability scheme will be respected in federal court. A related but more limited question is whether a separate series is a "person" who may file for bankruptcy on its own, or whether the master LLC is required to file on its behalf, potentially exposing all its series to the claims of the creditors in bankruptcy.\textsuperscript{13} The series' ability to stand on its own as an entity separate from its master may provide the answer to many of the questions left open by a lack of legislation, case law, and practice. The hesitance to utilize SLLCs resembles the legal and business worlds' reluctance to employ standard LLCs before the Internal Revenue Service (IRS) issued guidance on the taxation of LLCs.\textsuperscript{14}

In 1977, Wyoming was the first state to adopt an LLC statute.\textsuperscript{15} Despite the entity's attractive characteristics, few businesses and attorneys were anxious to use the LLC in large part due to the uncertainty surrounding its tax classification and the liability protection afforded by other states and bankruptcy courts.\textsuperscript{16} Not until 1988, when the IRS issued Revenue Ruling 88-76, which provided the LLC with partnership tax status, did the LLC become the admired business form it is today.\textsuperscript{17}

\begin{flushleft}
Hanson, \textit{Series LLCs in Business and Tax Planning}, TAX ADVISER, Jan. 2010, at 50, 55. The series provides a less expensive means for this practice than establishing a holding structure, and could be utilized by businesses that either seek to avoid the hassle and costs associated with requesting the change or simply believe the change would be rejected by the IRS. \textit{Id.}


\textsuperscript{12}\textit{Id.} at 38.

\textsuperscript{13}See Dykema, \textit{Current Status of the Series LLC: Illinois Series LLC Improves upon Delaware Series LLC but Many Open Issues Remain}, HG.ORG, Nov. 1, 2006, http://www.hg.org/articles/article_1865.html ("The first issue is whether a series may be a debtor for bankruptcy purposes and make a separate bankruptcy filing."). Under the Bankruptcy Code, any person, which includes individuals, partnerships, and corporations, may be a debtor. \textit{Id.}


\textsuperscript{16}\textit{Id.}

\textsuperscript{17}\textit{Id.}
\end{flushleft}
few years, states all across the country adopted LLC statutes of their own, and states that already had statutes began amending theirs to provide for greater flexibility.\(^{18}\) Similarly, a few years later, the questions concerning bankruptcy were resolved.\(^{19}\)

Over time, LLC legislation has expanded, the practice of forming LLCs has increased, and consequently, case law has developed. We presently have a stable and sophisticated body of law and regulations that allow for the use of the LLC entity to be as sound and predictable as the corporate entity. If history is any indication, this same pattern of growth and popularity could follow the SLLC.

The ability to answer the unknowns surrounding the SLLC may calm some of the fears that practitioners and business owners have about forming such entities. If these questions are answered favorably, the SLLC could become an incredibly popular entity form because of its cost-saving attributes and tax and liability advantages. In the end, resolution of these uncertainties is necessary to determine whether a business entity that could bring greater efficiency to the marketplace is currently underutilized.

This paper cannot attempt to answer all the questions that surround the SLLC, because, as with any new entity form, there are numerous uncertainties that will only be resolved through practice. Instead, this paper will examine whether a single series should be eligible to file for bankruptcy on its own behalf or whether the master LLC will be required to file the petition before the court. This question will be analyzed under Delaware's SLLC statute. Analogies to bankruptcy court decisions analyzing LLCs will help answer the question of whether a series may file for bankruptcy on its own. Before examining these cases, however, we will review the section of the Delaware Code authorizing SLLCs. In addition, the issue of whether a business is a separate legal entity is integral to the question of whether the business may file for bankruptcy in its own name. Because the language of the SLLC statute provides no guidance on the question as it pertains to a series, the remainder of the paper will examine other areas of law that may shed light on the issue. The first of these secondary sources of law to be reviewed will be the tax regulations under section 7701 of the Internal Revenue Code (IRC) that provide the analysis for entity classification. Finally, the paper will focus on "Massachusetts" business trusts to see how the series within those trusts have been classified. By looking at tax regulations and series trusts, we will be able to extract a

---

\(^{18}\)See id.

\(^{19}\)See In re ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 293 (Bankr. N.D. Ohio 2001) (holding that an LLC is a "person" eligible for bankruptcy protection).
set of characteristics that, if present in an SLLC, will afford the entity a separate legal status.

II. THE DELAWARE SERIES LIMITED LIABILITY COMPANY

Under Delaware's SLLC statute, "[a] limited liability company agreement may establish or provide for the establishment of one or more designated series of members, managers, limited liability company interests or assets." Each series may have its own business purpose or investment objective and may be organized for "any lawful business, purpose or activity, whether or not for profit." Additionally, each series is authorized to have separate rights, powers, and duties concerning specific property or obligations of the LLC and the related profits and losses.

One of the more important features of the Delaware SLLC is that the debts, liabilities, obligations, and expenses of a single series are enforceable only against the assets of that series and not against those of the master LLC or another series. Conversely, the debts, liabilities, obligations, and expenses of the LLC or another series are unenforceable against the single series; this double-sided protection is available as long as (1) the assets held by the single series are accounted for separately from assets held by the LLC or another series; and (2) notice of this limited liability is set forth in the certificate of formation and the LLC agreement. The notice of the limitation does not need to reference a specific series, and, interestingly, it may be included in the certificate and agreement regardless of whether a series has been established by the LLC. A series created under the Delaware statute also has "the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued."

The LLC agreement may create classes of members or managers, each associated with a different series, with different rights, powers, and duties and may allow additional classes to be established in the future with

---

21Id.
22See id. § 18-215(c).
23See id. § 18-215(a).
24See tit. 6, § 18-215(b). This accounting and record keeping requirement is essential in creating and maintaining the internal limited liability among the separate series. The assets of the series must be kept separate from the assets of the parent LLC as well as the other series to receive internal limited liability. Id.
25Id. § 18-215(b).
26Id. § 18-215(c).
different rights, powers, and duties from those assigned to previously established classes.\textsuperscript{27} Voting rights of such classes may be varied within and among the series, and may even be eliminated for a certain series.\textsuperscript{28} An individual series, without regard to the master LLC or another series, may be granted the sole right to vote on matters which pertain only to itself.\textsuperscript{29} Only upon agreement, however, may a member or manager be obligated personally for the debts and liabilities of one or more series.\textsuperscript{30}

Management responsibilities vest in the members proportionate to the interest owned.\textsuperscript{31} Consequently, a series may have more than one manager.\textsuperscript{32} The fact that a manager leaves one series will not affect his position as a manager in another series.\textsuperscript{33}

Unless stated in the LLC agreement, a Delaware series will not terminate simply because its last member ceases to be a member.\textsuperscript{34} Although the dissolution of the main LLC will cause all series to terminate, under the Delaware statute, "a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company."\textsuperscript{35} An extremely interesting characteristic of the series is that it may make a distribution despite the master LLC's insolvency.\textsuperscript{36}

To close, the statute dictates several rules with which foreign SLLCs must comply. If a foreign SLLC wishes to do business within the state of Delaware,\textsuperscript{37} while maintaining the internal limited liability of its series, the foreign SLLC must register with the state and indicate that it is governed by an LLC agreement that provides for the establishment of series and internal liability shields.\textsuperscript{38} The foreign SLLC must also indicate on its application

\textsuperscript{27}Id. \S 18-215(e).
\textsuperscript{28}See tit. 6, \S 18-215(e).
\textsuperscript{29}Id. \S 18-215(f).
\textsuperscript{30}Id. \S 18-215(d).
\textsuperscript{31}Id. \S 18-215(g). The parent LLC, as an entity, is not a member of each series; rather it is the members of the parent that may become members of the series. Allan G. Donn et al., \textit{Choice of Business Entity— 2009 Update: Choosing and Using Business Forms in Uncertain Times}, ALI-ABA VIDEO L. REV., Feb 17, 2009, at 1, 4, available at http://files.ali-aba.org/thumbs/datastorage/skoobersuoc/pdf/UCP0217_chapter_03_thumb.pdf.
\textsuperscript{32}tit. 6, \S 18-215(j).
\textsuperscript{33}Id. \S 18-215(k).
\textsuperscript{34}See id.
\textsuperscript{35}Id. \S 18-215(k).
\textsuperscript{36}See tit. 6, \S 18-215(i).
\textsuperscript{37}Interestingly, it does not seem as though Delaware allows a foreign series itself to register for business within the state. The language of the section implies that only the master LLC has the authority to register. \textit{See id.} \S 18-215(n) (referring only to a "foreign limited liability company" and never to a "foreign series").
\textsuperscript{38}Id.
whether the debts, liabilities, and obligations associated with a single series will be enforceable solely against the assets of the series and not the SLLC or another separate series. It must also indicate whether the debts of the foreign SLLC or a separate series may be enforceable against a series.39

III. WHO IS ELIGIBLE UNDER THE BANKRUPTCY CODE FOR PROTECTION?

Under section 109(a) of the Bankruptcy Code "only a person that resides or has domicile, a place of business, or property in the United States, or a municipality, may be a debtor" in bankruptcy.40 "The term 'person' includes individual, partnership, and corporation . . . ."41 The Code, even after undergoing substantial changes in 2005, has never been revised to provide for the explicit inclusion of an LLC, let alone an SLLC, and so the question remains as to whether a series, in its own name, will be permitted to file a petition for bankruptcy.

This question is important to SLLCs from a liability standpoint. If the series can file for bankruptcy on its own, creditors are limited to the assets within the individual series. If the master LLC is required to file, however, the assets of all the series as well as the master may become part of the bankruptcy estate. This will subject the master to creditors and essentially destroy the liability protections that seem to be intended by the SLLC statute.

This issue involves a battle between state and federal law. Even though the Delaware statute seems to insist on internal liability protection, federal courts are not required to follow its lead, especially the equity-based bankruptcy courts.42

The first step to answering the question of whether an individual series may file for bankruptcy on its own will be to look at bankruptcy court decisions that have allowed LLCs to file. These decisions are helpful in understanding how bankruptcy courts will handle the statutory interpretation question of whether a series is a "person." Hopefully, an analogy will be found that will impliedly grant permission to a series to file on its own behalf.

39Id.
41Id. § 101(1).
In 2001, the question of whether an LLC was a person eligible to file bankruptcy as a debtor was presented to the court as an issue of first impression.\textsuperscript{43} ICLNDS Notes Acquisition, LLC (ICLNDS) filed a voluntary petition under chapter seven of the Bankruptcy Code.\textsuperscript{44} The LLC listed itself as the debtor.\textsuperscript{45} Noting that there was no specific reference in the Bankruptcy Code to an LLC, the court acknowledged that under Code section 102(3), the word "includes" was not limiting, and therefore, despite the explicit provision allowing for individuals, partnerships, and corporations, LLCs were not automatically barred from filing.\textsuperscript{46}

In addition, the court examined the characteristics of an LLC, such as ICLNDS, which was formed under Ohio's statute. The court found that (1) an LLC may be formed for any lawful purpose; (2) an LLC is comprised of owners, called members; (3) management rights in an LLC vest in the members in proportion to their capital contributions; and (4) members and managers are not personally liable for the debts of the LLC simply because they are a member or manager.\textsuperscript{47} Noting that the LLC is neither a corporation nor a partnership, the court termed the LLC a "hybrid" of the two forms stating:

"[The LLC] is a form of legal entity that has attributes of both a corporation and a partnership but is not formally characterized as either one. Generally, an LLC offers all of its members, including any member-manager, limited liability as if they were shareholders of a corporation but treats the entity and its members as a partnership for tax purposes."\textsuperscript{48}

The court concluded that "[a]s corporations and partnerships are eligible to be debtors, and because an LLC draws its character from both of those forms of doing business, an LLC is similar enough to those entities" that it may be a debtor under the Code.\textsuperscript{49}


\textsuperscript{44} \textit{id.}

\textsuperscript{45} \textit{id.}

\textsuperscript{46} \textit{id.}

\textsuperscript{47} \textit{In re ICLNDS}, 259 B.R. at 292.

\textsuperscript{48} \textit{id. at 292-93} (quoting Broyhill v. DeLuca (\textit{In re DeLuca}), 194 B.R. 65, 71 (Bankr. E.D. Va. 1996)).

\textsuperscript{49} \textit{id. at 293}. There are numerous cases that allow LLCs to file bankruptcy. See, e.g., \textit{In re KRSM Props., LLC}, 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004); \textit{In re Midpoint Dev., LLC}, 313 B.R. 486, 488-89 (W.D. Okla. 2004), \textit{rev'd on other grounds}, No. 04-1509-R, slip op. at 7 (Banks. W.D. Okla. Feb. 3, 2005), \textit{aff'd}, 466 F.3d 1201 (10th Cir. 2006); \textit{In re Calhoun}, 312 B.R. 380, 383 (Banks. N.D. Iowa 2004).
The *In re ICLNDS* court seemed to find two factors especially important in deciding the issue: (1) that the LLC is a legal entity, and (2) that the LLC had several characteristics similar to those entities that are explicitly granted the authority to file.\(^5^0\) As to the second factor, the court specifically focused on the following characteristics: (1) the member-managers' protection against personal liability; (2) the LLC's right to organize for any lawful purpose; (3) the existence of member-owners with the authority to manage the company in proportion to their share of capital contribution; and (4) the partnership-like tax status.\(^5^1\)

Delaware law should be examined to see if a series has similar characteristics to those highlighted by the court in *In re ICLNDS* making the SLLC also worthy of filing for bankruptcy. Looking first at the set of four characteristics, if separate records and accounts of the assets are kept, a series' member-managers are awarded limited liability protection similar to the personal liability protection awarded to an LLC.\(^5^2\) As the debts and liabilities of the series are limited to such specific series, the debts and liabilities of the master LLC and other series cannot be imposed upon the assets of the specific series.\(^5^3\) Identical to an LLC, a member-manager of an SLLC may become exposed to personal liability only by consenting in the SLLC agreement.\(^5^4\) Also, just like the Ohio LLC, a series may be formed under the Delaware Code for any lawful business, purpose, or activity, whether or not for profit,\(^5^5\) and each series may have its own unique business purpose or investment objective.\(^5^6\) Akin to the LLC, the management of a series vests in the members in proportion to their percentage or interest in the profits of the series.\(^5^7\) But as to the court's final factor, unlike an LLC, which has an IRS-authorized tax status, the tax classification of a Delaware series has yet to be defined by the IRS or by the state.\(^5^8\) Even so, given that the series resembles the LLC—and therefore, the corporate and partnership form—in three out of the four factors expressed

---

\(^{5^0}\) *In re ICLNDS*, 259 B.R. at 292-93.

\(^{5^1}\) *Id.* at 292.


\(^{5^3}\) *Id.*

\(^{5^4}\) *Id.* § 18-215(d); see *id.* § 18-303.

\(^{5^5}\) *Id.* § 18-215(c).

\(^{5^6}\) *Id.* tit. 6, § 18-215(a).

\(^{5^7}\) *Id.* § 18-215(g); see *id.* § 18-402.

by the court, it is likely that a series formed under the laws of Delaware would pass the "likeness test" articulated by the court in In re ICLNDS.

As for the In re ICLNDS court's analysis finding that the Delaware Code is silent as to whether a series itself is a legal entity form or rather a subpart of an overarching legal entity. In order to answer the question of whether a series is a legal entity form, the courts will have to look beyond the Delaware statute and the Bankruptcy Code to other areas of law that provide a means for determining entity status. Similarly, they may have to look for analogies existing in other entities that might shed light on the series' status as a separate or aggregate entity.

IV. DETERMINING WHETHER THE SERIES IS A SEPARATE ENTITY

Usually, a federal court will apply state law when the subject matter is one that is traditionally left to the states. The exception to this rule is when federal law explicitly preempts state law. Traditionally, the ability to establish and regulate business entities has been left to the state. Therefore, it should be left to the state to decide whether a business form is a separate entity. But despite awarding the series numerous characteristics similar to those bestowed upon traditional legal entities, Delaware has yet to declare whether a series is a separate entity.

In such a case where there is no explicit ruling, one may need to look to other areas of the law that address a similar issue. In this context, tax and trust law might provide useful guidance. In order to determine the correct taxation of an entity, the government must decide whether the business form is a separate entity. Similarly, the issues surrounding the classification of a series within a Massachusetts trust may be predictive of how series of an SLLC will be classified.

60I articulate this as a "test" to succinctly describe that portion of the In re ICLNDS court's analysis.
61BISHOP & KLEINBERGER, supra note 58, ¶ 2.11. The synopsis by the Delaware House of Representatives on the SLLC enabling legislation provides that "series will be treated in many important respects as if [they] were a separate limited liability company." Craig A. Gerson, Taxing Series LLCs, 45 Tax Mgmt. 75, 76 (2004). Despite this language, we still do not know whether Delaware intended for a series to be treated as a separate legal entity, or whether its intent was to have the series aggregated with the SLLC. Id.
63Gerson, supra note 60, at 76.
A. Separate Entity Test Through Federal Tax Regulations

Because there is no state law on point, courts may consult federal law to provide a means for determining whether a business organization is a separate entity. Federal law establishes how a series will be classified for federal tax purposes; in making this determination, however, the IRS deems as highly relevant the organization's status and its rights and obligations under state law.

The regulations issued by the IRS for section 7701 of the IRC establish the procedure for determining a business's classification for federal income tax purposes. The first question is whether the organization is a separate entity distinct from its owners. Even if an organization is not a separate legal entity under state law, federal tax law may still grant the organization separate entity status if there is a well-defined level of business activity and purpose within the organization. The second question asks whether a special provision of the code exists to govern how the entity must be treated for tax purposes. If there is no provision, the unincorporated organization is a separate entity classified either as an ordinary trust or "business entity." A business entity that is not treated as a corporation is treated as an eligible entity recognized as a partnership, if there is more than one owner, or disregarded as a separate entity it has only one owner. An eligible entity, however, can elect to be treated as a corporation. The

---

64See, e.g., Treas. Reg. §§ 301.7701-1 to -4 (as amended in 2009); see also BISHOP & KLEINBERGER, supra note 58, ¶¶ 2.11-2.11[1] (stating that "whether an organization is an entity separate from its owners for federal tax purposes is a question of federal . . . law," although "the Service has indicated that for classification purposes, federal tax law requires a determination of the status of the organization or relationship under state law"). Moreover, Delaware state law tends to follow federal law regarding the tax classification of entities, so differences are likely to be few. The state of Delaware has issued a private letter ruling stating that it plans to classify a series in a manner equivalent to LLCs and allow the use of the check-the-box regulations. Del. Dept. of Fin., Div. of Rev., Priv. Ltr. Rul. (Sept. 16, 2002).

65BISHOP & KLEINBERGER, supra note 58, ¶ 2.11-2.11[1]. The dichotomy between state and federal law suggests that there is a risk that certain entities may be recognized as a separate entity by one government authority and treated as an aggregate singled entity by another.

67Id. § 301.7701-1.
68Bishop, supra note 5, at 489.
69Treas. Reg. § 301.7701-2(a).
70Id.
71Id. §§ 301.7701-1(a)(4), -2(a), -3(a)-(b)(ii). Under check-the-box provisions established by the IRS in 1997, "any entity not formed under a corporate statute [is not] classified as a corporation." Bishop, supra note 5, at 461. Unfortunately, these provisions do not explicitly provide for series. Id. at 459.
72Treas. Reg. §§ 301.7701-2(a), -3(a).
counterpart to this analysis is that if a business organization is not a trust or a business entity, the business would likely not be recognized as a separate entity (at least for federal tax purposes).

Because there is no concrete or specific authority on whether a series is a separate entity, one way to arrive at the answer is to analogize and ask whether a Delaware series is a trust or business entity. If the answer is "no," then it would seem that a series is not a separate entity and may not, without an act from Congress, file for bankruptcy on its own behalf.

B. Is a Series a Trust or a Business Entity?

In order to determine whether a series is a business entity or a trust, it may be helpful to define both classifications. "[T]he term 'trust' as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries . . . ."73 The hallmark of a trust arrangement is the separation of responsibility for preservation of the trust's assets, vested in the trustee alone, from the receipt of the trust's proceeds, shared only by the beneficiaries.74 Trusts generally do not have an objective to carry on a business for profit.75 For example, business trusts are not classified as trusts, because they are not formed merely to hold property for beneficiaries but rather are formed to make a profit.76 The IRS will apply a "substance over form" rule to trusts.77 Therefore, the fact that title to property is placed in the name of a trustee for the benefit of another will not prevent a finding of a business entity if, based on the facts, such classification is more appropriate.78

A business entity is a separate entity that is not a trust.79 The United States Supreme Court has held that a business will be considered a business entity if it carries on a profit-making business and does not merely protect or conserve property, which is the function of a trust.80 In Commissioner v. Culbertson, the United States Supreme Court held that a partnership entity

73 Id. § 301.7701-4(a).
74 See id.
75 Id.
76 Treas. Reg. § 301.7701-4(h).
77 See id. ("The fact that any organization is technically cast in the trust form . . . will not change the real character of the organization if the organization is more properly classified as a business entity . . . ").
78 See id.
79 Id. § 301.7701-2(a).
will be found if "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."\textsuperscript{81} In other words, the Court found that if the parties could show an intent to engage in a business for profit, the enterprise is a business entity and not a trust. The Court indicated that several factors may be used to determine whether a separate business entity exists, including (1) little to no overlap of ownership in assets; (2) the existence of a separate business purpose; and (3) whether liability protection is afforded the assets of an organization.\textsuperscript{82}

Whether a series formed under Delaware law is a trust or business entity depends on the purpose of the series, and therefore, the answer could vary among different series. The Delaware Code provides that a series may have a separate business purpose or investment objective and may conduct any lawful business, purpose, or activity, whether or not for profit.\textsuperscript{83} If a series' individual function is to hold and preserve an asset used by the organization, it is not likely to be focused on profit-making. In such a case, the series may resemble a trust.\textsuperscript{84} On the other hand, if a series is created in a manner where it has a profit-making business function separate from that of the SLLC or another series, it looks more like a business entity. This argument will be even stronger if, following the approach taken by the Culbertson Court, the series owns assets in its name only and the certificate and agreement provide that liability is limited to the individual series and not intended to encumber the other series or the master.

For example, if a business owner had a factory that produced organic ice cream and another that produced gluten-free ice cream cones, this owner could likely organize under an SLLC and establish two series, one for the ice cream operation and one for the cone operation. The ice cream series will own all the machinery and equipment used exclusively in the ice cream production process while the cone series owns the machinery and equipment used exclusively in the cone production. Additionally, the certificate and LLC agreement state that no series may obligate or encumber another series or its master in any contract or agreement. Here, each operation has a business purpose—one producing and distributing ice cream and the other producing and distributing cones—that should be distinct

\textsuperscript{81}Comm'r v. Culbertson, 337 U.S. 733, 742 (1949).
\textsuperscript{82}See id. at 740-42 (setting forth a totality-of-the-circumstances test); see also TIFD III-E, Inc. v. United States, 459 F.3d 220, 230-33 (2d Cir. 2006) (applying Culbertson).
\textsuperscript{84}"Because the series LLC statutes permit, but do not require, a series to have a separate business purpose, a series could be set up to be either a business entity or a trust." Michael W. McLoughlin & Bruce P. Ely, The Series LLC: Raises Serious State Tax Questions but Few Answers Are yet Available, J. Multistate Tax'n & Incentives, Jan. 2007, at 6, 12.
enough to accord each series standalone business entity status. In the scenario presented, the series are likely to be found separate entities.

While it is great news that the series seems capable of fitting the definition of "trust" or "business entity," without definitive authority classifying a series, a problem will arise when the organization and purpose of a series does not fit neatly into either definition. For example, where the series holding assets involves multiple "associates," or where the members are too involved in the handling of the property to establish a "hands-off" beneficiary-type relationship, the series may not quite fit within the definition of a "trust." Additionally, the series may not have a business purpose distinct enough from the master LLC or another series to be considered an independent profit-making "business entity."

To illustrate, look at three owners who have a manufacturing business for which they own the factory building, the land, and several expensive pieces of equipment. The owners establish an SLLC under which they create one series to hold title to the building, one to hold title to the land, three series to hold title to one piece of equipment each, and another series to run the manufacturing operations. Each owner has a proportionate interest in the series, so that each series has three members. Each member has a say in the daily use and allocation of such property. The series that hold title to property simply serve as a shield for liabilities that might arise on the manufacturing floor. The title-holding series do not exist to merely hold and conserve the property of the members because those assets are integral to the profit-making scheme. Additionally, there is too much involvement by the members for a trustee-beneficiary relationship to exist. Finally, the property in those series, while used to generate a profit in the manufacturing business, do not have a business purpose independent from the master and sister series. In such a case, without definitive guidelines, a series may not qualify as either a trust or a business entity, but rather may be found as part of a single aggregate SLLC, and consequently, not a separate entity.

V. WHAT MAKES AN ENTITY SEPARATE?

Legislation and case law provide some guidance on what constitutes a separate legal entity. While none of it pertains to a series directly, it may nonetheless provide some assistance to the issue at hand.

A. The IRS Analogy

The IRS has stated that a joint venture or contractual arrangement may be a separate entity if the participants carry on a trade, business, or
financial operation and divide the profits derived from such activities.\textsuperscript{85} An arrangement which exists merely to share expenses or share costs is not a separate entity. Similarly, co-ownership of property, even property that is rented or leased, will also not create a separate entity.\textsuperscript{86}

The legal and economic relationship between owners and their assets must change to create a separate entity.\textsuperscript{87} If the series' schedule places any restrictions on the members' rights with regard to the assets contributed and held in the name of the series (most often it will), a strong case could be made that the series should be a separate entity if the operating agreement could evidence that such rights are altered in several ways.\textsuperscript{88} There are numerous examples of how those rights may be altered; for example, property may be titled directly in the name of the series.\textsuperscript{89} Similarly, a change in title ownership certainly denotes a change in the legal relationship between owner and property as well as a change in the economic benefits (and losses). Other examples of restriction which may be placed on the property include waiving partition rights, limiting the right to sell or assign interests, or subjecting the property's use to the vote of the members.\textsuperscript{90}

If a series is (1) created and operated for a unique business purpose; (2) organized to evidence an intent to limit liability to the individual series; and (3) organized to alter the original property rights to items contributed to the series or to re-title property in the name of the series solely, it would seem that the series should be found a separate entity.

\textbf{B. The Series Trust Analogy}

Another way to determine whether a series of an LLC should be treated as a separate entity is to examine whether a series of a "Massachusetts" business trust has been recognized as a separate entity. The IRS has been asked to expound on the tax classification of a series within a series trust numerous times. Holding that a series may select its own tax status, the United States Tax Court has by implication found these

\textsuperscript{85}Treas. Reg. § 301.7701-1(a)(2) (as amended in 2009).

\textsuperscript{86}id.; see also id. § 301.7701-1(c).

\textsuperscript{87}See Gerson, supra note 60, at 77; see also McLoughlin & Ely, supra note 84, at 12; Peaslee & Tenreiro, supra note 10.

\textsuperscript{88}Gerson, supra note 60, at 77-78.

\textsuperscript{89}Retitling property in the name of the series in exchange for an ownership interest establishes a wall of liability protection. See DEL. CODE ANN. tit. 6, § 18-215(b) (2006 & Supp. 2009).

\textsuperscript{90}Gerson, supra note 60, at 78. Leaving assets titled in the member's name may leave the door open for personal liability.
series to be separate entities, for presumably if there are multiple tax classifications among the series it would seem implausible that the series and the master trust are a single aggregate entity.91

By examining the tax court's analysis, we can perhaps establish characteristics present in the trust series that grant them separate status. If many of these characteristics are present in an SLLC or could be created through the operating agreement, it might be reasonable to assume that the S.LLC will be deemed a separate entity by the IRS. This finding will give the bankruptcy court persuasive support for the argument that a series is a separate entity entitled to file a petition on its own behalf.

In National Securities Series-Industrial Stock Series v. Commissioner, the tax court assumed for the first time that the separate series of a single investment trust would be classified as distinct taxable entities.92 Although the issue of whether the series were separate entities was not before the court, the court's ruling was based on the assumption that each of the series was a separate entity.93

The petitioners in National Securities Series were regulated investment companies that had been created under a single trust agreement.94 The trusts were before the court to determine whether amounts paid to shareholders on the redemption of shares were preferential

---

91 Single entities are not known to have multiple tax classifications within a single year. See Grob & Hannawa, supra note 10, at 28.
92 See Nat'l Sec. Series-Indus. Stock Series v. Comm'r, 13 T.C. 884, 885-86 (1949). The IRS also has found that series established under state law in a business trust are separate entities. E.g., I.R.S. Priv. Ltr. Rul. 98-19-002 (May 8, 1998). The trust involved in the ruling was authorized to have an unlimited number of series and had been established with ten initial series. Id. The interests of the series were to be separate and distinct from any other series and no series was to be liable for the debts and obligations of any other series. Id. Expenses were to be limited to the assets of the particular series. Id. Any matter affecting only one series was to be voted on only by the interest holders of the series. Id. Based on National Securities Series, as well as Rev. Rul. 55-416, the IRS concluded that a series possessing these characteristics would be a separate entity for tax purposes. Id. Numerous private letter rulings have been issued on the subject of trust series. Bishop & Kleinberger, supra note 58, ¶ 2.11[3]. Generally, a series formed under a trust is found to be a separate entity where the series has separate assets and liabilities that are segregated under state law from the assets and liabilities of another series. Id. Each series is commonly found to have its own investment objectives, and voting rights on matters pertaining only to the series are limited to members of that series. Notably, the trusts in these cases have several characteristics which resemble the series established under an S.LLC. Id. But see Union Trusted Funds, Inc. v. Comm'r, 8 T.C. 1133, 1137 (1947) (concluding that an investment company with multiple portfolios incorporated under a state law is to be classified as a single taxable entity).
93 See Nat'l Sec. Series, 13 T.C. at 885-86.
94 Id. at 885.
dividends, not includible as dividends paid for calculating a surtax credit.\textsuperscript{95} The court found that the amounts paid were in fact not preferential dividends, and therefore, were includible in the credit calculation.\textsuperscript{96} Based on these new credit calculations, the court determined that each petitioner had no tax due and no deficiencies.\textsuperscript{97} The decision implied that each petitioner was an entity separate from each other as well as the overarching trust because each was entitled to a separate calculation of tax liability.

Six years later, the IRS confirmed the implied holding of \textit{National Securities Series} in Revenue Ruling 55-416.\textsuperscript{98} The question at issue in this ruling was whether amounts paid to shareholders of a regulated investment company, representing the shareholders' proportionate part of net income receivable, would be included in calculating whether the company had distributed taxable dividends of at least ninety percent of net income.\textsuperscript{99} In arriving at its conclusion, the IRS applied the holding of \textit{National Securities Series} to the facts at hand and, consequently, authorized the assumption set forth in that case that a series of a trust is a separate entity.\textsuperscript{100}

\textsuperscript{95}Id.
\textsuperscript{96}Id. at 887-89.
\textsuperscript{97}\textit{Nat'l Sec. Series}, 13 T.C. at 889.
\textsuperscript{99}Id.
\textsuperscript{100}See id. The IRS issued another Revenue Ruling in the same year as Ruling 55-416 that appears to authorize the creation of a separate entity merely through the contractual terms of an operating agreement. See Rev. Rul. 55-39, 1955-1 C.B. 403. A general partner of a firm with both general and limited partners was allowed, pursuant to the partnership agreement, to direct that certain amounts of his capital account be invested in securities of his choosing. Id. Upon such investment, the purchase price of the securities was charged to the general partner's capital account. Id. The general partner's capital account was then credited with any dividends or interest received from those investments. Id. The partnership agreement treated the investments purchased by the general partner as property of the partnership with respect to creditors. Id. However, the property was acquired exclusively for the general partner who was granted all ownership rights associated with the property. Id. Furthermore, since the partnership distributed cash to the general partner at the time the partnership acquired the securities, the IRS held that the securities became property of the general partner upon their purchase. Id. In the end, the IRS ruled that a partnership's investment of a member's contributed capital into investments of the member's own choosing which were then credited to his account would be deemed a withdrawal of that capital from the partnership itself. Id.

Essentially, the partnership was able to separate partnership assets, which would normally have been considered property of the partnership, simply through the terms of its agreement. This ruling suggests that by wording an operating agreement to provide exclusive control over specific assets within a partnership, an organization may create a separate taxpayer, even though the assets may still be subject to the claims of organization's creditors. Based on the ruling, one could speculate that by providing the series with enough control over the series' assets per the SLLC operating agreement, a separate entity is created.
In 1984, the IRS released a General Counsel Memorandum (GCM) in which the separate entity issue moved front and center. The IRS was asked whether a "Massachusetts" business trust consisted of one or three separate unincorporated associations.\textsuperscript{101} The GCM is useful because it provides a set of facts common to most trust series that are granted separate entity status, and thus provides a means to view the similarities and dissimilarities between a series established under a trust and a series established under an SLLC.

The case presented a trust document that authorized the establishment of separate investment portfolios, or funds, each of which was represented by a separate series of shares.\textsuperscript{102} Moreover, each fund had different investment objectives, assets, managers, and shareholders.\textsuperscript{103} The interest of the shareholder of a portfolio was limited to the net assets of that fund, and the holder of the beneficial interest was entitled to a pro rata share of the dividends and distributions of that fund only.\textsuperscript{104} Similarly, upon redemption or liquidation, an interest holder would be confined to the assets of his or her particular portfolio.\textsuperscript{105} The liabilities and expenses of each portfolio were assessed only to the assets of such portfolio.\textsuperscript{106} If a voting matter affected only one series, then only the shareholders of that particular portfolio were entitled to vote on the matter.\textsuperscript{107}

The IRS explained that in \textit{National Securities Series}, the Tax Court assumed that several series of a single investment trust would be distinct taxable entities.\textsuperscript{108} Furthermore, the IRS expressed its approval of \textit{National Securities Series} in Revenue Ruling 55-416, when it confirmed that a series fund would be a separate taxable entity.\textsuperscript{109} Based on the above characteristics of the funds, the IRS determined that the investment portfolios in this case were also taxable as separate entities.\textsuperscript{110}

Some of the characteristics present in the portfolios may or may not be present in a series formed under an SLLC depending on the dictates of

\textsuperscript{102}Id.
\textsuperscript{103}Id.
\textsuperscript{104}Id.
\textsuperscript{106}Id.
\textsuperscript{107}Id.
\textsuperscript{108}Id.
\textsuperscript{110}Id. The IRS noted that, based on the above-listed characteristics, "each fund is a separate and distinct economic entity consisting of separate pools of assets and streams of earnings . . . . Under these circumstances, we believe that the funds shall be classified as separate taxable entities." Id.
the operating agreement. For example, the ownership interest of the trust presented in the GCM differed among each portfolio. Presumably, the interests of one series could be identical to that of a sister series. Each fund portfolio had a differing management arrangement. In the case of a series under an SLLC, the operating agreement may or may not alter the management scheme among the series. Additionally, joint activities between the separate fund portfolios were extremely limited, whereas with a series under an SLLC, often the series are holding various parts of an interconnected business. The existence of these provisions in an SLLC operating agreement makes the analogy between the trust series and the SLLC series less convincing.

The two organizational forms, however, still share numerous qualities, including, but not limited to (1) a separate pool of assets and earnings streams; (2) shareholder limitation to the assets of the series in which they hold a membership interest; (3) the limitation of debts and obligations to the assets of the particular series; and (4) the ability to limit voting on matters pertaining only to the individual series to members of such series.

The content of the organizational documents seems to have the greatest effect on determining whether a series will be treated as a separate entity. A Delaware SLLC series has a good chance of being deemed a separate entity because the controlling statute, if followed as a guide, would ensure that the four characteristics listed above are present in the operating agreement and certificate of formation. Furthermore, the series with the best chance of receiving a separate classification is one that also maintains an independent business purpose, limits joint activity among the series, and has a varying ownership and management scheme.

In 2008, the IRS issued its first private letter ruling relating to an SLLC. Fortunately, the SLLC involved was a Delaware SLLC. The ruling concerned a "Massachusetts" business trust, which was operating as an open-end mutual fund. The beneficial interests of the trust were

---

111 See supra notes 92-100 and accompanying text.
113 Id.
115 Keep in mind that the statute provides default provisions which may be contracted away by the members.
117 Id.
divided into shares, which the trustees then divided into several series of portfolios. 118 Each portfolio was separate from the others. 119 The trust desired to reorganize into a Delaware SLLC by having each portfolio transfer its assets to an SLLC series in exchange for membership in the individual series. 120 Upon liquidation of the trust, the shareholders of the trust portfolios would be given a membership interest in the series. 121 Each series would have its own investment objectives. 122 The series would contain separate investments and the operating agreement would restrict the transferability of shares. 123 The income, gains, and losses from the assets would be credited or debited solely against the holding series. 124 The shareholders of the series would share only in the income from that series, and the creditors would be limited to the assets of the particular series with which they contracted. 125 Voting on matters that involve only an individual series would be limited to members of that series. 126 Upon liquidation of a series, the members would be limited to the assets of their respective series. 127

Upon reorganization, any series with a single member would be classified as "Type D" and would elect to be treated as a disregarded entity. 128 A "Type D" series that gains additional owners, and certain series with more than one member, would elect to be treated as a partnership, classified as "Type P." 129 Yet other particular series, "Type C," would elect to be treated as an association and taxable as a corporation. 130 The company asked the IRS to confirm, among other things, whether each portfolio could elect its tax classification according to the plan above. 131 The IRS responded in the positive. 132 Impliedly, the IRS agreed to allow

118 Id.
119 Id.
121 Id.
122 Id.
123 Id.
125 Id.
126 Id.
127 Id.
129 Id.
130 Id.
131 Id.
132 I.R.S. Priv. Ltr. Rul. 2008-03-004 (Jan. 18, 2008). Another question that arises from the SLLC is whether a foreign state will respect the internal liability shields of the SLLC and whether it will find the series to be separate entities. The mutual fund that requested the 2008 private letter ruling from the IRS requested an almost identical ruling from the state of Massachusetts,
the series to be treated as separate taxable entities, as multiple tax classifications among the series would seem impossible if the organization was thought of as an aggregate entity. 133

Presumably, a series that is established with similar characteristics will be regarded as a separate entity. Particularly relevant for the Delaware series is that the ruling is based on the Delaware statute and the

specifically seeking the state's approval to have the series classified as separate entities. Mass. Dep't of Rev. Priv. Ltr. Rul. 08-2 (Feb. 15, 2008). Based on the decision of the IRS to treat each entity separately for tax purposes, as well as the similarities in structure and practice to the series of a series trust, Massachusetts explicitly stated that each series should be classified as a separate entity for income tax purposes. Id. The state's commissioner of revenue also relied on National Securities Series and Rev. Rul. 55-416. Id. The California Franchise Tax Board (FTB) has also stated its intent to classify each series separately if "(1) the holders of the interests in each series are limited to the assets of that series upon redemption, liquidation, or termination, and may share in the income only of that series;" and (2) the payment of expenses, charge, and liabilities of the series are limited to the assets of that series. Cal. Franchise Tax Bd., 2009 Ltd. Liab. Co. Tax Booklet, at 7; see Sheldon I. Banoff & Richard M. Lipton, California Redefines Series LLCs for Tax Purposes: Take Three, J. TAX'N 254, 255-56 (2009). California FTB, however, seems to imply that six factors need to be present for a series to be classified as a separate entity for tax purposes: (1) each series must have its own members and be managed separately from the master; (2) each series must maintain separate books and records; (3) the members must not be responsible for the series' debts and obligations; (4) the series conducts only part of the master's business or its own distinct business; (5) each series has its own assets and liabilities; and (6) each series is liable only for its own debts and creditors may only access assets of that series. Id. Additionally, courts in Maine have, at least once, held that the form and liability structure of the Delaware SLCC "does not create a truly separate legal entity capable of independently pursing its own legal claims." GxG Mgmt., LLC v. Young Bros. & Co., No. 05-162-B-K, 2007 WL 1702872, at *1 (D. Maine June 11, 2007). Presumably, now that a Delaware series has been given the right to sue in its own name, i.e., pursue its own legal claim, see DEL. CODE ANN. tit. 6, § 18-215(c) (2006 & Supp. 2009), courts should recognize an individual series as an entity which may be a party in suit. 133There are other areas of business and law which have presented a serial entity as containing several separate entities within. For example, the SEC has stated that (1) asset pools of specific securities could be a separate issuer despite the fact that the pools result from a common sponsor, because the security holders would look to a single pool for their return; and (2) subfunds of a UCTIS unit trust are separate issuers, as the umbrella trust "is analogous to a domestic 'series company.'" H. Karl Zeswitz, Jr. & William R. Pauls, "Check-the-Box" Classification of Series Entities, 9 DAILY TAX REP. (BNA), Jan. 22, 2009, at 7, 7 (internal quotation omitted). The IRS has also stated that it will treat each cell of "protected cell companies," which consist of multiple insulated cells, as a separate entity if (1) the assets and liabilities of the cells are segregated from the assets and liabilities of other cells; and (2) the arrangement would result in both risk shifting and distribution. Rev. Rul. 2008-8, 2008-5 I.R.B. 340; Notice 2008-19, 2008-5 I.R.B. 366. The Delaware Insurance Department has recently announced that it has licensed the world's first serial entity captive, which organized under the Delaware SLCC statute. Press Release, Del. Dept' of Ins., Delaware Insurance Commissioner Karen Weldin Stewart Licenses World's First Serial Captive Insurance Company (Jan. 25, 2010), available at http://www.delawareinsurance.gov/departments/news/012510-Press-FirstCaptiveCompany. Given the Department's touting that the "series captive entity provides greater flexibility and advantage than . . . protected cell structures," it can only be hoped that the series of the captive entity will be allotted the separate entity status afforded protected cell structures. Id.
reorganization plan was based on the provisions contained in section 18-215. A series established under the Delaware Code would likely, or at least could, have many of the same characteristics presented in the letter ruling. Therefore, the series would likely be recognized as a separate entity and provide the bankruptcy courts with persuasive authority to classify the series as a "person" eligible to be a debtor. 134

VI. CONCLUSION

While the use of LLCs is more expansive than ever before, private industry has been fairly hesitant to utilize SLLCs despite the entity's potential to save costs and reduce administrative burdens. Much of this hesitance is owed to the fact that there is very little legislative and judicial guidance on how the SLLC will be treated in numerous arenas. The issue of whether a series would be able to file a petition for bankruptcy in its own name, thereby limiting creditors to the assets of a single series, is one important but unanswered question.

Unfortunately, this question can only be answered by determining whether a series is a separate legal entity and able to qualify as a "person" under the Bankruptcy Code. By examining the case law of the bankruptcy courts, as well as exploring the tax laws that deal with entity classification, it has been determined that the organization and character of a series is integral to whether a series will be granted separate entity status.

As long as the legislature and the courts remain silent on the issue, practitioners will need to be especially attentive to how the organizational documents are drawn and executed. A series seeking to file separately from its sister series or master LLC should maintain a distinct business purpose separate from that of the master or sister series. It may also help if the business is carried on for a profit. Additionally, the operating agreement should evidence the alteration of member's property rights. There are other attributes which, if present, create a convincing argument for granting a series separate entity status, including (1) separate assets and liabilities segregated under state law from the assets and liabilities of another series; (2) separate investment objectives; (3) shareholder limitations to the assets of the series in which they hold a membership interest; and (4) the ability to

134 Although rulings are nonauthoritative except as to the person to whom it is issued, the fact that the SLLC involved was a Delaware SLLC should provide an increased surety that a Delaware series will be found a separate entity. The ruling may also encourage business trusts to migrate to Delaware and reorganize into SLLCs where they will be able to utilize the contractual freedoms of the LLC operating agreement, including the elimination of fiduciary duties.
limit voting on matters pertaining only to the individual series to solely the members of such series. Simply by using the Delaware statute as a guide, many of these attributes can easily show up in the operating agreement.

Given that a Delaware series, like the LLC, has similar traits present in corporations and partnerships, a single series should be able to petition for bankruptcy on its own behalf, if it is found to be a separate legal entity. The soundest means currently available to guarantee separate entity status is by ensuring that the operating agreement, as well as the day-to-day functions of the series, conforms to the standards expressed above.135

Shannon L. Dawson

135 Illinois and Iowa provide explicitly that a series shall be treated as a separate entity in an attempt to provide the SLLC more stability and certainty. 805 ILL. COMP. STAT. 180/37-40(b) (2006 & Supp. 2009); IOWA CODE ANN. § 489.1201(3) (West 2009). Additionally, an Illinois series creates its own existence by filing a separate certificate of designation rather than amending the parent’s. 805 ILL. COMP. STAT. 180/37-40(d). Interestingly, treatment varies throughout the world as well. For example, the Cayman Islands provides explicitly that the series is not a legal separate entity, but Luxembourg does treat a series as its own entity. Cayman Islands Companies Law § 216(2) (2009 rev.); Luxembourg Securitisation Act of 2004 § 62(3). Maintaining formalities not only in the operating agreement but also in practice may help to ensure that the courts do not apply the equitable doctrine of “substantive consolidation,” whereby they would disregard the internal shields of limited liability. It may also help to counter an argument for veil piercing.