

SHOULD TEXAS ADOPT ALL OR PART OF THE UNIFORM PROTECTED SERIES ACT?

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I. INTRODUCTION

On July 19, 2017, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment in all of the States the Uniform Protected Series Act (UPSA).¹ The final version of the UPSA, with prefatory note and comments, is dated November 14, 2017.² This article reviews the UPSA and considers whether Texas should adopt all or a part of the UPSA. In the course of that review, this article considers certain issues arising under the existing Texas series LLC legislation and comments on how the UPSA deals with those issues. This article concludes that the UPSA contains many desirable provisions that should be considered for enactment by Texas.³

II. THE DEVELOPMENT OF SERIES LLC LEGISLATION

Delaware in 1996 enacted the first statutory provisions for series LLCs at the same time that it added series provisions to its limited partnership act.⁴ The Delaware legislature added series provisions to its limited partnership act because “sophisticated, highly funded deals were commonplace for use by Delaware limited partnerships.”⁵ Series provisions became part of the Delaware LLC Act the same year, presumably to maintain the Delaware LLC Act’s stature as a modern, forward-looking statute.⁶ Although arguably not responding to any perceived need,⁷ lawyers quickly began seeing potential uses for series

1. The UPSA was drafted by the Drafting Committee on Series of Unincorporated Business Entities of NCCUSL. The author was an Advisor to the Drafting Committee on behalf of the Business Law Section of the American Bar Association. See UNIF. PROTECTED SERIES ACT (UNIF. LAW COMM’N 2017).

2. *Id.*

3. For an analysis of the UPSA comparing it to all series jurisdictions and considering whether the UPSA should be adopted by a non-series state, see generally Allen Sparkman, *The Uniform Protected Series Act—A Welcome Advance in Series LLC Legislation* (Nov. 16, 2017), available at <https://ssrn.com/abstract=3072760>.

4. Ann E. Conaway, *A Business Review of the Delaware Series: Good Practice for the Informed*, 1, 4 WIDENER U. L. SCH. LEGAL STUD. RESEARCH PAPER NO. 08-19 (2008), <http://papers.ssrn.com/abstract=1097645>.

5. *Id.* The use of Delaware limited partnerships may have been commonplace in 1996, but times have changed. Data from the Delaware Secretary of State indicates that in 2015, 10,746 limited partnerships were formed, 128,042 LLCs were formed, and 38,288 corporations were formed. Delaware Division of Corporations 2015 Annual Report (2015), https://corp.delaware.gov/Corporations_2015%20Annual%20Reports.pdf.

6. See Conaway, *supra* note 4, at 4–5.

7. Conaway, *supra* note 4, does not discuss why Delaware thought it was good policy to add series provisions to its LLC statute. Conaway’s article provides a good discussion of statutory trusts for anyone desiring more information about those entities, but the example of a series LLC that she discusses in pages 50–51 does not make it apparent why the persons in her example would not have been just as well-served, if not better served, by forming separate LLCs. In a later paper, Conaway asserts that “[t]he Delaware series . . . is a prime example of a legislative response to market demands of the business community.” Ann E. Conaway & Peter I. Tsouflias, *The Delaware*

LLCs after Delaware and a few other states enacted series provisions.⁸ Texas adopted new provisions permitting the creation and operation of series limited liability companies under Texas law in 2009.⁹

Under Texas law, and the laws of the majority of other states with series LLC legislation, the organizer forms a juridical LLC (the series LLC) and provides in its certificate of formation the power to form individual series.¹⁰ Once the certificate of formation is on file, the LLC can then form one or more series pursuant to the procedure set forth in its company agreement.¹¹ The individual series can be viewed as

Series LLC: Sophisticated and Flexible Business Planning, 2 MICH. J. OF PRIV. EQUITY & VENTURE CAP. L. 97 (2012). The quoted statement appears to be correct with respect to the Delaware Statutory Trust and possibly the Delaware Limited Partnership Act, but Conaway and Tsofilas present no evidence of any market demand for series LLCs. *See id.* Delaware also permits series LLCs to be used to form a protected cell company under the Captive Insurance Companies provisions of the Delaware Insurance Code. *See* DEL. CODE ANN. tit. 18, §§ 6931–38. The Delaware Insurance Commissioner stated in a news release dated January 25, 2010 that this structure avoids the minimum premium tax per cell otherwise applicable under the Captive Insurance Companies provisions. *See* DELAWARE DEPARTMENT OF INSURANCE, *Delaware Insurance Commissioner Karen Weldin Stewart Licenses World's First Serial Captive Insurance Company* (Jan. 25, 2010), <http://www.delawareinsurance.gov/departments/news/012510-Press-FirstCaptiveCompany.s.html>. The Delaware Insurance Commissioner also stated in a news release dated January 28, 2011 that Delaware is the only state permitting the use of series LLCs to form captive insurance companies. DELAWARE DEPARTMENT OF INSURANCE, *Delaware Doubles Number of Captive Domiciles in 2010* (2011), <http://www.delawareinsurance.gov/departments/news/DOIPRESSRELEASEDeDoubleCaptive.pdf>.

8. As of August 1, 2017, the jurisdictions that have enacted series legislation are Alabama (ALA. CODE § 10A-5A-11.01 (2015)); Delaware (DEL. CODE ANN. tit. 6, § 18-215 (West 2015)); the District of Columbia (D.C. CODE § 29-802.06 (West 2013)); Illinois (805 ILL. COMP. STAT. 180/37-40 (2015)); Indiana (IC §§ 23-18.1-1-1—23.18.1-7-4) Iowa (IOWA CODE ANN. § 489.1201 (West 2015)) (Iowa also provides for protected insurance cell companies—IOWA CODE ANN. § 521G.7 (West 2015)); Kansas (KAN. STAT. ANN. § 17-76, 143 (West 2015)); Missouri (MO. REV. STAT. § 347.186 (2013)); Montana (MONT. CODE ANN. § 35-8-202 (2015)) (requiring that the articles of organization for a series LLC attach a list naming each series member and including their individual operating agreements and requires a filing fee of \$70.00 plus \$50.00 for each series member.); Nevada (NEV. REV. STAT. 86.296 (2015)); Oklahoma (OKLA. STAT. tit. 18, § 2054.4 (2015)); Puerto Rico (14 P.R. LAWS ANN. tit.14, § 3967 (2015)); Tennessee (TENN. CODE ANN. § 48-249-309 (2015)); Texas (TEX. BUS. ORGS. CODE § 101.601 (West 2015)); and Utah (UTAH CODE ANN. § 48-3a-1201 (West 2015)). In addition, North Dakota and Wisconsin have legislation providing for entities known as series LLCs, but the statutes in these states do not provide for internal liability shields. *See* North Dakota (N.D. CENT. CODE § 10-32-02.57 (2015)); Wisconsin (WIS. STAT. § 183.0504 (2015)). Delaware law also provides for series limited partnerships. DEL. CODE ANN. tit. 6, § 17-218 (2007). The District of Columbia, Illinois, Indiana, Iowa, Kansas, Missouri, and Utah series LLC statutes permit the series LLC to elect to treat individual series as separate entities. D.C. CODE § 29-802.06; 805 ILL. COMP. STAT. 180/37-40; IC §§ 23-18.1-1—23.18.1-7-4; Iowa: IOWA CODE ANN. § 489.1201 KAN. STAT. ANN. § 17-76,143 (West 2015); MO. REV. STAT. § 347.186 (2015); and UTAH CODE ANN. § 48-3a-1201(3)(a) (2013). The District of Columbia, Illinois, and Kansas require the filing of a certificate for each series. Missouri requires the limited liability company to file “articles of organization that separately identify each series which is to have limited liability.” MO. REV. STAT. § 347.186.2 (1)(f) (2013).

9. TEX. BUS. ORGS. CODE ANN. § 101.601 (West 2011).

10. *Id.* § 101.604.

11. *Id.* § 101.601(a).

administrative accounting entities distinct from each other and the series LLC and, if properly formed and maintained, with individual liability protection between and among the individual series and the series LLC.¹² Thus, there may be only a single series LLC and an infinite number of individual series formed under the series LLC.

The possibility of forming a single juridical entity that could form multiple series with the statutory promise of liability protection for each individual series from the obligations of the series LLC itself and all of its other series prompted much interest. Interestingly, although it is the author's experience that people hearing about series LLCs for the first time focus on the internal liability protection, when several Delaware practitioners reported to the NCCUSL Drafting Committee¹³ on their experience with using Delaware series LLCs, the liability protection was often not a major factor in the client's decision.¹⁴

12. *Id.*

13. UNIF. PROTECTED SERIES ACT, *supra* note 1.

14. In the course of drafting the UPSA, the NCCUSL Drafting Committee, *supra* note 1, received emails (on file with author) from several Delaware practitioners reporting on their experience, and that of their colleagues, in using Delaware series LLCs. The comments of the Delaware lawyers may be summarized as follows:

- Several clients who asked about using a series LLC decided not to after being advised on the uncertainties of judicial scrutiny, bankruptcy, tax treatment, UCC perfection, and the cost to set up a series LLC, and recommended best practices and alternatives;
- The statistics on the number of series LLCs formed in Delaware may be skewed because some tax practitioners routinely include series language in their certificates of formation to afford their clients the flexibility to set up series later;
- The uses for which series LLCs were formed included:
 - Family wealth transfers;
 - Equity participation planning;
 - Licensing issues;
 - Real estate holdings;
 - Other situations in which the client preferred the series LLC for separate operations instead of separate subsidiaries;
 - In another case, the client liked the idea of being able to appoint a number of people as either the CEO or president of a series;
- In many of the situations in which the client decided to use a series LLC, the internal liability shields were not an important factor.

In the situations in which the Delaware practitioners reported that series LLCs were used, in the author's view, in only one or two situations could the client not have accomplished the client's stated goals by using several wholly-owned subsidiaries. Granted, using subsidiaries would result in greater filing fees. However, if one considers the record-keeping requirements of the series provisions of the Delaware LLC Act the series structure may not avoid a meaningful amount of administrative burden. The Delaware series LLC record-keeping requirements are similar to the Texas requirements discussed *infra* note 12 and accompanying text. For a more comprehensive summary of the emails from the Delaware practitioners, see Sparkman, *infra* note 34, at 19–22.

III. ISSUES AND QUESTIONS ARISING UNDER THE EXISTING TEXAS SERIES LEGISLATION WITH A COMPARISON TO THE UPSA

A. *Requirements for forming a series and name and notice requirements.*

The Texas LLC Act states:

- (a) A company agreement may establish or provide for the establishment of one or more designated series of members, managers, membership interests, or assets that:
- (1) has 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; or
 - (2) has a separate business purpose or investment objective.¹⁵

If notice and record-keeping requirements in the statute are satisfied,¹⁶ the Texas statute provides for an internal liability shield between the various individual series and the series LLC itself as follows:

- (1) the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a particular series shall be enforceable against the assets of that series only, and shall not be enforceable against the assets of the 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.¹⁷

The only notice required by the Texas series provisions is that the LLC's certificate of formation state the limitation on liability of series.¹⁸ Notice is sufficient even if no series has been created and there is no

15. TEX. BUS. ORGS. CODE ANN. § 101.601(a) (West 2011).

16. *Id.* § 101.602(b) states:

Subsection (a) applies only if:

- (1) the records maintained for that particular series account for the assets associated with that series separately from the other assets of the company or any other series;
- (2) the company agreement contains a statement to the effect of the limitations provided in Subsection (a); and
- (3) the company's certificate of formation contains a notice of the limitations provided in Subsection (a).

17. *Id.* § 101.602(a).

18. *Id.* § 101.602(b)(3).

requirement that any specific series be referenced.¹⁹ There is also no requirement in the Texas statute that the name of a series indicates that it is a series or that the name include the name of the series LLC.²⁰ Texas does require, however, that if the name of any series established by a series LLC differs from the name of the series LLC stated in its certificate of formation, the LLC must file an assumed name certificate for that series.²¹ Query whether the name of a series would not always vary from the name of the series LLC stated in its certificate of formation—meaning Texas would always require an assumed name certificate for a named series—which may well be the intent of the statute.²²

To establish a protected series under the UPSA, UPSA § 201(b) requires the series LLC to file a protected series designation that states the name of the series LLC and the name of the protected series.²³ Moreover, UPSA § 202(b) requires that the name of a protected series begin with the name of the series LLC and contain the phrase “Protected Series” or “protected series” or the abbreviation “P.S.” or “PS”.²⁴ For example, if a series LLC named Bluebonnet LLC formed two series—Magnolia and Paint Brush, the series’ names would have to be Bluebonnet LLC Magnolia Protected Series and Bluebonnet LLC Paint Brush Protected Series. As noted, the term “Protected Series” may be abbreviated. The author submits that the Texas legislature should favorably consider adopting this feature of the UPSA. The author does not believe, however, that there is a good policy reason for requiring that the name of a series begin with the name of the series LLC. Why should it not be acceptable that the names be Magnolia, a Protected Series of Bluebonnet LLC and Paint Brush, a Protected Series of Bluebonnet LLC?

Moreover, it appears questionable whether the UPSA is correct in using the term “protected series” instead of just “series.” The Prefatory Note to the UPSA states:

Following long-standing practice with statutory trusts and investment companies, existing protected series statutes use “series” as the term of art for the construct just described. However, outside the investment trust context, using “series” can be quite confusing. “Series” has an established and very different meaning with regard to bonds, corporate stock, etc. To avoid confusion, this act uses the term “protected series”—to signal the

19. *Id.* § 101.602(b).

20. *Compare id.*, with UNIF. PROTECTED SERIES ACT § 201(b) (UNIF. LAW COMM’N 2017).

21. *See* TEX. BUS. & COM. CODE ANN. § 71.002(2)(H) (West 2013).

22. *See id.* (It appears unlikely that a series LLC would want to establish a series without a name).

23. UNIF. PROTECTED SERIES ACT § 201(b), called “protected series” in the UNIF. PROTECTED SERIES ACT; *see also supra* notes 19, 75–78 and accompanying text.

24. UNIF. PROTECTED SERIES ACT § 202(b).

different meaning and to call attention to the internal, horizontal shields which are the construct's defining characteristic.²⁵

The author submits that the Drafting Committee's concern is overstated. The author is unaware of any research indicating that attorneys or their clients have issues distinguishing among the different ways "series" is used in existing legislation. In addition to the instances the Prefatory Note discusses, some LLC agreements use the term "series" to differentiate among different classes of membership interests.²⁶ Although the author does not mean to suggest that this is a good practice, it may be a more or less common practice, and, again, the author is unaware of any material issues raised by this practice. There is no reason, of course, why a state could not adopt all or some of the provisions of the UPSA and not adopt the use of the term "protected series." The author suggests that the Texas Legislature should favorably consider adopting the protected series designation provisions of the UPSA with the following changes:

- Do not use the term "protected series";
- Do not require that the name of the series LLC come first in the name of a series; and
- State who the governing persons of the series are.²⁷

B. *What Powers Does an Individual Series Possess?*

Under the Texas series LLC provisions, like the majority of state series LLC acts,²⁸ the entity for state law purposes is the juridical LLC (that is, the LLC actually formed by a filing with the state filing office) and not an individual series within the LLC.²⁹ Stated differently, an individual series within a series LLC is not a separate entity under the law of Texas. Indeed, Texas, alone among the series jurisdictions, makes this crystal clear: "For purposes of this chapter and Title 1, a series has

25. UNIF. PROTECTED SERIES ACT, Prefatory Note 2.

26. *Id.*

27. *See infra* notes 60–62 and accompanying text.

28. *See Conaway, supra* note 4.

29. *See Conaway, supra* note 4. It is unclear that the term "separate entity" or even the term "juridical entity" has an accepted meaning; *See* Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, 42 SUFFOLK U. L. REV. 655 (2009); J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STANFORD AGORA 73, 76 (2001), <http://agora.stanford.edu/agora/libArticles2/agora2v1.pdf>; David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA 39, 58 (2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=264141. Humpty Dumpty would feel right at home—"When I use a word, it means just what I choose it to mean—neither more nor less." LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 57 (Cosimo, Inc.) (1865).

the rights, powers, and duties provided by this subchapter to the series but is not a separate domestic entity or organization.”³⁰

An individual series of a Texas series LLC 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[,]”³¹ but an individual series of a Texas series LLC may not enter into a merger or conversion because the individual series is not a separate entity.³² This approach also appears in the UPSA.³³

C. What is the Significance of Non-Separate Entity Status?

This feature of series LLCs raises questions under the UCC, federal, and state tax law.³⁴ The feature creates issues in determining how to satisfy foreign entity qualification requirements when an individual series does business outside the state of formation of the series LLC and, more importantly, whether the internal liability shields of a series LLC will be respected outside its state of formation.³⁵ It also appears that the concept of separate series within a single entity confuses many.³⁶ Confusion may arise because, despite the lack of separate entity status, a series of a Texas series LLC may “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.”³⁷ However, such an individual series may not enter into a merger or conversion.³⁸ There are

30. TEX. BUS. ORGS. CODE ANN. § 101.622 (West 2015).

31. See *id.* § 101.605.

32. *Id.* § 101.622: “For purposes of this chapter and Title 1, a series has the rights, powers, and duties provided by this subchapter to the series but is not a separate domestic entity or organization.” Texas permits “a domestic entity” to effect a merger. *Id.* § 10.001; *id.* §§ 101.602, 604. Members are not admitted as members of an individual series but are members of the series LLC who are then in turn “associated” with one or more series. *Id.* §§ 101.606–607, -610(b). A member may or may not have any economic interest in the series LLC itself; the member’s economic interest may be tied only to one or more series. The provisions of the Texas series LLC provisions clearly provide that an individual series of a Texas series LLC is not a separate legal entity. *Accord* Conaway & Tsoflias *supra*, note 7, at 126–27, noting that the existence of a series under Delaware law is entirely derivative of the series LLC. This analysis would also apply to individual series of series LLCs formed under Texas law.

33. UNIF. PROTECTED SERIES ACT § 602 (UNIF. LAW COMM’N 2017); see *infra* notes 47–48 and accompanying text.

34. For a look at federal and state tax issues with series LLCs, see Allen Sparkman, *Through the Looking Glass: Series LLCs in 2016*, 3 BUS. & BANKR. L.J. 1, 32–35 (2016).

35. *Id.* at 43–46.

36. See generally J. Leigh Griffith & James E. Long, Jr., *Series LLCs—December 2013 Update on Recent State Legislative and Taxation Developments*, 55 TMM, 83, 89 (2014) (discussing how the series structure may lead to confusion).

37. DEL. CODE ANN. tit. 6, §§ 18-215(c) (West 2015); TEX. BUS. ORGS. CODE ANN. § 101.605 (West 2006); See Conaway & Tsoflias, *supra* note 7, at 126.

38. TEX. BUS. ORGS. CODE ANN. §§ 101.606–.607, 101.610(b) (West 2015); *Id.* § 101.605; *Id.* §§ 101.606–607, -610(b), -611. The provisions of the Texas series statute clearly provide that an individual series of a Texas series LLC is not a separate legal entity. *Accord* Conaway & Tsoflias, *supra* note 7, at 126–27, noting that the existence of a series under Delaware law is entirely

no Texas statutory provisions allowing persons to be admitted as members of a series—they must be admitted as members of the series LLC and “associated” with one or more series.³⁹ Other uncertainties may be answered by the company agreement.⁴⁰

For example, although the applicable statutes are silent on this, presumably a member could transfer not just the member’s interest in the series LLC, but also the member’s status associated with one or more series. Likewise, because the powers of an individual series include the power to contract and hold title to assets, presumably an individual series might be admitted as a member of another LLC, whether or not the other LLC is a series LLC, and could acquire other equity interests, such as corporate stock.⁴¹

These powers would appear to permit an individual series to become a member of the series LLC that created it and then be associated with other series. Admittedly, this possibility may bring to mind the image of a snake swallowing itself, but its existence adds to the potential confusion that may result from statements that individual series are not separate legal entities. The UPSA prohibits a protected series from being a member of the series LLC of which it is a protected series and from establishing a protected series.⁴² The author submits that this provision of the Uniform Protected Series Act represents a welcome clarification that should also be considered favorably by the Texas Legislation for adoption.

D. Assets of a Series LLC and Its Series and Limitation of Liability.

As this article notes previously,⁴³ section 101.602(b) of the Texas LLC Act, which provides for the internal shields of a Texas series LLC, is limited as follows:

Subsection (a) applies only if:

- (1) the records maintained for that particular series account for the assets associated with that series separately from the other assets of the company or any other series;

derivative of the series LLC. This analysis would also apply to individual series of series LLCs formed under the Texas series LLC statute.

39. See TEX. BUS. ORGS. CODE ANN. §§ 101.606–.607, -610(b), -611. *Accord* Conaway & Tsofilias, *supra* note 7, at 126–27, noting that the existence of a series under Delaware law is entirely derivative of the series LLC. This analysis would also apply to individual series of series LLCs formed under the Texas series LLC provisions.

40. Vela Wood, *The Company Agreement Explained: What is a Company Agreement* (June 26, 2013), <https://velawoodlaw.com/the-company-agreement-explained-what-is-a-company-agreement/>.

41. See Sparkman, *supra* note 34.

42. UNIF. PROTECTED SERIES ACT § 201(a) (UNIF. LAW COMM’N 2017).

43. TEX. BUS. ORGS. CODE ANN. § 101.602(b) (West 2017).

- (2) the company agreement contains a statement to the effect of the limitations provided in Subsection (a); and
- (3) the company's certificate of formation contains a notice of the limitations provided in Subsection (a).⁴⁴

The UPSA distinguishes among assets that are associated assets of a protected series, assets that are associated assets of the series LLC, and assets that are neither associated assets of a protected series or of the series LLC.⁴⁵ This distinction under the UPSA has significance because the UPSA provides that claims against the series LLC or a protected series may be enforced against non-associated assets.⁴⁶ The UPSA's provisions on assets and record-keeping with respect to assets are much more extensive than the provisions of the Texas series LLC provisions:

1. Only an asset of a protected series may be an associated asset of the protected series, and only an asset of the series LLC may be an associated asset of the series LLC.⁴⁷
2. An asset of a protected series may be an associated asset only if the protected series creates and maintains records that state the name of the protected series and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:
 - a. Identify the asset and distinguish it from any other assets of the protected series, any assets of the series LLC, and any assets of any other protected series of the series LLC;
 - b. Determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and
 - c. If the protected series acquired the asset from the series LLC or another protected series of the series LLC, determine any consideration paid, the payor, and the payee.⁴⁸
3. An asset of a series LLC is an associated asset of the series LLC only if the series LLC creates and maintains records that state the name of the series LLC and describe the asset with sufficient specificity to permit a disinterested, reasonable individual to:
 - a. Identify the asset and distinguish it from any other assets of the series LLC and any assets of any protected series of the series LLC;

44. *Id.*

45. UNIF. PROTECTED SERIES ACT §§ 301, 404.

46. *Id.* § 404(b).

47. *Id.* § 301(a).

48. *Id.* § 301(b).

- b. Determine when and from what person the protected series acquired the asset or how the asset otherwise became an asset of the protected series; and
 - c. If the series LLC acquired the asset from a protected series of the series LLC, determine any consideration paid, the payor, and the payee.⁴⁹
4. The UPSA permits the records and recordkeeping required to “be organized by specific listing, category, type, quantity, computational or allocational formula or procedure, including a percentage or share of any asset or assets, or in any other reasonable manner.”⁵⁰
5. A series LLC or a protected series may hold an associated asset directly or indirectly, through a representative, nominee, or similar arrangement, except that:
 - a. A protected series may not hold an associated asset in the name of the series LLC or another protected series of the series LLC; and
 - b. The series LLC may not hold an associated asset in the name of a protected series of the series LLC.⁵¹

The UPSA states the following with respect to the limitation on liability and enforcement of claims:⁵²

1. UPSA § 401(a) provides that a person is not liable . . .⁵³ for a debt, obligation, or other liability of a protected series solely by reason of being or acting as an associated member, series manager, or protected series transferee of the protected series. Furthermore, a person is not liable to a series LLC solely by reason of being or acting as an associated member, protected series manager, or protected series transferee of the series LLC.
2. UPSA § 401(b) provides that, subject to UPSA § 404, (i) a debt, obligation, or other liability of a series LLC is solely the debt, obligation, or other liability of the series LLC; (ii) a debt, obligation, or other liability of a protected series is solely the debt, obligation, or other liability of the protected series; and (iii) a series LLC is not liable for a debt, obligation, or other liability of a protected series of the series LLC solely by reason of the protected series being a protected series of the series LLC or the series LLC (a) being or acting as a protected series manager of the protected series; (b) having the protected series

49. *Id.* § 301(c).

50. *Id.* § 301(d).

51. *Id.* § 301(e).

52. *See* § 401.

53. *Id.* § 401(a). The UPSA includes “directly or indirectly, by way of contribution or otherwise” after “liable.”

manage the series LLC; or (c) owning a protected series transferable interest of the protected series.

3. A protected series of a series LLC is not liable . . .⁵⁴ for a debt, obligation, or other liability of the series LLC or another protected series of the series LLC solely by reason of (i) being a protected series of the series LLC; (ii) being or acting as a manager of the series LLC or as a protected series manager of another protected series of the series LLC; or (iii) having the series LLC or another protected series of the series LLC be or act as a protected series manager of the protected series.
4. USPA § 402(a) states except as otherwise provided in § 402(b), a claim seeking to disregard a limitation in § 401 is governed by the principles of law and equity, including a principle providing rights to creditors or holding a person liable for a debt, obligation, or other liability of another person, which would apply if each protected series of the series LLC were an LLC that is formed separately from the series LLC and distinct from the series LLC and any other protected series of the series LLC. UPSA § 402(b) states that the failure of an LLC company or a protected series to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground to disregard a limitation in UPSA § 401(a) but may be a ground to disregard a limitation in UPSA § 401(b) (described in XIV (B) and (C), above).
5. UPSA § 403 provides that remedies available to a judgment creditor of a member or transferee of an LLC under the state's general LLC statute apply to a judgment creditor of (i) an associated member or protected series transferee of a protected series; or (ii) a series LLC, to the extent the series LLC owns a protected series transferable interest of a protected series.
6. UPSA § 404 provides that judgments may be enforced against non-associated assets as follows:
 - a. A judgment against the series LLC may be enforced against an asset of a protected series of the series LLC if the asset:
 - i. Was a non-associated asset of the protected series on the incurrence date;⁵⁵ or

54. *Id.*

55. *Id.* § 404(a)(2). "Incurrence date" means the date on which a series LLC or a protected series incurred the liability giving rise to a claim that a claimant seeks to enforce under UNIF. PROTECTED SERIES ACT § 404.

- ii. Is a non-associated asset of the protected series on the enforcement date.⁵⁶
- b. A judgment against a protected series may be enforced against an asset of the series LLC if the asset:
 - i. Was a non-associated asset of the series LLC on the incurrence date; or
 - ii. Is a non-associated asset of the series LLC on the enforcement date.
- c. A judgment against a protected series may be enforced against an asset of another protected series of the series LLC if the asset:
 - i. Was a non-associated asset of the other protected series on the incurrence date; or
 - ii. Is a non-associated asset of the other protected series on the enforcement date.

The author believes that the record-keeping and liability provisions of UPSA §§301 and 401 should be considered favorably by the Texas Legislature for inclusion in the Texas series LLC statutory provisions.

E. Entity Transactions.

The UPSA brings welcome clarity to the concept of mergers involving series LLC or their series. The UPSA provides that a protected series may not engage in any entity transaction.⁵⁷ The UPSA also provides that a series LLC may not engage in any entity transaction except that a series LLC may be a party to a merger if each other party to the merger is an LLC and the surviving company is not created in the merger.⁵⁸ It is not clear that the series LLC itself needs to be this restricted. For example, what would the potential harm be if a corporation merged into a series LLC in a transaction in which the corporation was not the survivor. The plan of merger could provide for what would happen to the assets and shareholders—whether they would become assets of the series LLC or of one or more of its series and,

56. *Id.* § 404(a)(1). “Enforcement date” means 12.01 AM on the date on which a claimant first serves process on a series LLC or a protected series seeking to enforce a claim against an asset of the series LLC or protected series by attachment, levy, or the like.

57. *Id.* § 602:

A protected series may not:

- (1) be an acquiring, acquired, converting, converted, merging, or surviving entity;
- (2) participate in a domestication; or
- (3) be a party to or be formed, organized, established, or created in a transaction substantially like a merger, interest exchange, conversion, or domestication.

58. *See id.* § 604.

likewise, whether the shareholders would be associated with one or more of the series of the surviving series LLC.

Texas already has the USPA's rule that a series may not engage in an entity transaction.⁵⁹ The Texas Legislature should consider whether any restrictions should be placed on the merger of a series LLC.

F. Information Rights.

Information rights present another issue that is complicated by a series structure. Although at first blush one might think that a member's information rights should be limited to the series that the member is associated with, there are some records that will always be relevant to all members. Moreover, in some cases, members may need access to information about other series to understand fully the information about the particular series a member is associated with. Texas law may limit the information rights of members associated with a series to information about the series LLC or other series.⁶⁰ The Texas LLC Act provides that the information rights section of the Texas LLC Act will be applied to a series LLC by substituting *series* for *limited liability company* or *company* and by substituting *member associated with a series* for *member*.⁶¹ This appears to limit a member's information rights to the series with which the member is associated;⁶² however, another provision of Texas law, in the Texas Business Organizations Code but not in the LLC Act, states that "each owner [and] member of a filing entity" may examine certain records of the entity.⁶³

The USPA provides some clarity with respect to the rights of a member of the LLC to information about a protected series of the series LLC if the member is not an associated member of the protected series.⁶⁴

59. See UNIF. PROTECTED SERIES ACT § 202 (UNIF. LAW COMM'N 2017); see also TEX. BUS. ORGS. CODE ANN. § 101.622 (WEST 2015).

60. See TEX. BUS. ORGS. CODE ANN. § 101.609 (West 2015).

61. *Id.* §§ 101.501, 101.609.

62. *Id.* § 101.502(a) (Texas is an outlier in that it also statutorily extends information rights to an assignee of a member).

63. *Id.* § 3.153; the books and records that § 3.153 states are subject to inspection are listed in TEX. BUS. ORGS. CODE ANN. § 3.151:

- (a) Each filing entity shall keep:
 - (1) books and records of accounts;
 - (2) minutes of the proceedings of the owners or members or governing authority of the filing entity and committees of the owners or members or governing authority of the filing entity;
 - (3) at its registered office or principal place of business, or at the office of its transfer agent or registrar, a current record of the name and mailing address of each owner or member of the filing entity; and
 - (4) other books and records as required by the title of this code governing the entity.

64. UNIF. PROTECTED SERIES ACT § 305 (UNIF. LAW COMM'N 2017).

A member of a series LLC that is not an associated member of a protected series has the same right to information about the protected series that a member that is not a manager of a manager-managed LLC has a right to information about that LLC under applicable law.⁶⁵

A person who was an associated member of a protected series has the same right to information about the protected series that a person dissociated as a member of a manager-managed LLC has a right to information about that LLC under applicable law, if provisions of applicable law provide information rights to dissociated members.⁶⁶

The legal representative of a deceased associated member of a protected series has the same right to information about the protected series that a legal representative of a deceased member of an LLC has to information about the LLC under applicable law.⁶⁷

A protected series manager⁶⁸ of a protected series has the same right to information about the protected series as a manager of a manager-managed LLC has to information about that LLC under applicable law.⁶⁹

The author believes that the information rights provisions of the Texas series LLC statute are adequate, although it would be appropriate for the Texas Legislature to consider whether there should be some rationalization between Texas Business Organizations Code §§ 101.501, 101.609, 101.502, and 3.153.

G. *Management of A Series.*

The Texas series LLC provisions provide that the governing persons of a series are the members or managers of the series as set forth in the company agreement.⁷⁰ If the company agreement does not so provide, then the governing persons of a series are the managers associated with the series if the series LLC is manager-managed or the members associated with the series if the series LLC is member-managed.⁷¹ The UPSA's provisions with regard to management are in Section 304 of the UPSA and do not appear to offer any improvement over the existing Texas provisions, particularly if the Texas Legislature

65. *Id.* § 305(a).

66. *Id.*

67. *Id.* § 305(c).

68. A protected series manager is "a person under whose authority the powers of a protected series are exercised and under whose direction the activities and affairs of the protected series are managed under the operating agreement and [the applicable LLC statute.]" *Id.* § 102(9).

69. *Id.* § 305(d).

70. TEX. BUS. ORGS. CODE ANN. § 101.608(a) (WEST 2011).

71. *Id.* § 101.608(b).

adopts this article's suggestion that the filing of a series designation be required when a series is formed.⁷²

H. Duties.

A problem for the negotiation and drafting of any company agreement is the application of duties, including fiduciary duties. In the case of a series LLC, this requires determining how the duties will be applied among and between the officers, managers, and members of a series LLC and its individual series. The management structure desired by the parties will dictate the precise analysis of the problem, and the flexibility permitted to management structures in LLCs will require that analysis be made on a case-by-case basis. The following generalizations, however, may be helpful because the company agreement may reduce or increase the duties applicable to the officers, members, or managers; the company agreement should address this issue overtly and not rely entirely on the applicable statute. Additionally, whether or not the parties intend the series LLC to function as a liability-limiting vehicle, the company agreement should address the liabilities for the management team (whatever its structure or format) across the series LLC and its individual series.⁷³ If there is more than one series, and there is management specifically assigned to a series, then it likely makes sense to limit their liability to the members associated with the other series. Conversely, if there is management that is common among all of the series, then it would make sense that the common management is liable to all of the series that they can affect (or relieved of liability with respect to all such series if that is the deal).

Conaway notes an additional potential problem, whether liability for breach of duty might penetrate the internal shields in the absence of an applicable provision in the company agreement—for example, when the actions of the governing persons of one series damages an asset (a liquor license) that is crucial to the business of all of the series, each of which operates a retail liquor store.⁷⁴ Conaway and Tsoflias also discuss this hypothetical and make a confusing statement:

If a member or members are associated with each store for purposes of management, profits, and day-to-day decision-making, should these members owe fiduciary duties across series boundaries without question? *Here, the answer should again be "no" since the reckless operation of one site could result in the loss of license for all the remaining properties.*⁷⁵

72. See UNIF. PROTECTED SERIES ACT § 304 (UNIF. LAW COMM'N 2017).

73. See David J. Willis, *The Texas Series LLC*, LONE STAR LAND LAW (2014), <http://www.lonestarlandlaw.com/LLC-Formation.html>.

74. See Conaway, *supra* note 4, at 56–57.

75. Conaway, *supra* note 4, at 56–57 (emphasis added).

Here, Conaway and Tsoflias noted the same problem that Conaway noted but suggested that liability for imperiling the liquor license should *not* cross the internal shields.⁷⁶ Perhaps Conaway and Tsoflias misspoke here, but that is not clear. They go on to state:

In the above circumstance, one could conclude that reasonable parties would have considered negotiating this subject. If the agreement is silent on fiduciary duties, the parties should not be bound to a court drafting terms into their agreement based upon a “hypothetical bargain”—terms upon which neither party (likely on purpose) agree. In other words, the agreement is precisely what the parties desire, without the imposition of common law care or loyalty obligations. Many investors gravitate to Delaware for the very purpose that they may draft their contracts in a sophisticated manner. Is it efficient and useful in the predictable development of Delaware’s LLC law to return to judicial paternalism in the enforcement of LLC agreements? The authors say not. The authors posit that Delaware benefits from its courts enforcing what the General Assembly adopted so concisely in 1992.⁷⁷

Conaway and Tsoflias argue that an agreement’s silence on fiduciary duties means the parties did not desire to have fiduciary duties apply.⁷⁸ Arguments based on silence are always suspect; as Gary Wills noted in another context, one may make “a silence mean anything.”⁷⁹ This Article posits it is just as likely that business people who do not include duty provisions in their company agreements were not properly advised, but had they been so advised, they likely would have wanted some standard to apply to their conduct. It has been noted in another context that “[i]t is one thing to have a clear understanding that people may elect to have a low standard of care among themselves. It’s quite a different thing to have that be the general rule for relatively unsophisticated people.”⁸⁰

It appears that Conaway and Tsoflias intended to contrast the customary day-to-day operations of the various liquor stores in their example with an extraordinary act of recklessness that would imperil the license on which all the stores depended.⁸¹ Perhaps, for example, the manager of one store (and of the series that owns and operates that store) knowingly sells alcohol to minors on several occasions. If the

76. Conaway, *supra* note 4, at 56–57.

77. Conaway & Tsoflias, *supra* note 7, at 129–30.

78. See Conaway & Tsoflias, *supra* note 7, at 129–30.

79. Gary Wills, *HEAD AND HEART* 201–02 (Penguin Press 2007).

80. J. William Callison, “*The Law Does Not Perfectly Comprehend...: The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations*,” 94 KY. L. J. 451, 476 n.98 (2006) (quoting a statement of NCCUSL Commissioner John Langbein during the consideration of what standard to adopt in the Revised Uniform Partnership Act).

81. See Conaway & Tsoflias, *supra* note 7, at 129.

legal advisor to the series LLC had raised such a possibility, the likely response of the principals would be, “none of us would ever do that.” But if the advisor forced the principals to consider what they would want in such a situation, it seems highly unlikely that the principals would have said, “we don’t think there should be liability to the rest of us if one of us screws up like that.” In this instance, it appears highly unlikely that the correct result would be for the internal shields of the series LLC to protect the reckless manager from liability to the other series.

The UPSA also adds clarity with respect to duties. The UPSA has adopted the position that there should be no default rule providing for duties across the internal shields of a series LLC. UPSA § 304(d) states:

- (d) Solely by reason of being or acting as a protected series manager of a protected series of a series limited liability company, a person owes no duty to:
 - (1) the company;
 - (2) another protected series of the company; or
 - (3) another person in that person’s capacity as:
 - (A) a member of the company which is not an associated member of the protected series;
 - (B) a protected series transferee or protected series manager of another protected series; or
 - (C) a transferee of the company.⁸²

The author believes this is a reasonable policy choice for a default rule. However, the company agreement may vary this rule.⁸³ The author submits that variation should be considered in any instance in which the actions of the protected series manager of one protected series could endanger the business of all of the other protected series of the series LLC, as, for example, in the case of a series LLC holding a liquor license supporting the business of several series operating retail liquor stores.⁸⁴

The Texas LLC Act does not expressly impose duties on managing persons of LLCs, but the statute implies that duties exist by allowing any duties to be expanded or restricted⁸⁵ and by the provision allowing governing persons to rely on certain information.⁸⁶ It would be appropriate for the Texas Legislature to consider whether any additional provisions should be added for clarity with respect to how duties apply in the series context.

82. UNIF. PROTECTED SERIES ACT § 304(d) (UNIF. LAW COMM’N 2017).

83. UNIF. PROTECTED SERIES ACT § 107(a) (failing to prohibit variation of UNIF. PROTECTED SERIES ACT § 304(d)).

84. See Conaway & Tsolfias, *supra* note 7, at 129.

85. TEX. BUS. ORGS. CODE ANN. § 101.401 (West 2012).

86. *Id.* § 3.102.

IV. SOME TERMINOLOGY OF THE UNIFORM PROTECTED SERIES ACT

The UPSA defines the term “protected series construct” as follows:⁸⁷

As provided by statutes in 13 states, the District of Columbia, and Puerto Rico, the protected series construct has the following aspects:

- an identifiable set of assets segregated within a limited liability company (“a series limited liability company”);
 - the assets:
 - comprise a protected series, which is empowered to conduct activities in its own name;
 - must be identified by thorough recordkeeping that distinguishes them from assets of the series limited liability company and assets of any other protected series of the company;⁸⁸
 - are obligated solely to persons asserting claims pertaining to activities related to the segregated assets; and
 - are not available to persons asserting claims arising from the activities of the series limited liability company or any other protected series of the company;
 - one or more members of the series limited liability company may be associated with the protected series, but not necessarily; and
- distributions arising from the assets and activities go to:
 - the members associated with the protected series, if any; or
 - the series limited liability company, if the series has no associated members.⁸⁹

Thus, a series limited liability company contains “internal shields” – *i.e.*, asset partitions confining the assets and liabilities of each protected series solely to creditors of that protected series. These “horizontal”

87. *See generally* UNIF. PROTECTED SERIES ACT, Prefatory Note.

88. *Id.* The recordkeeping is not part of the public record, although some assets might be titled in the name of a protected series. *See* UNIF. PROTECTED SERIES ACT § 301(e). The Prefatory Note characterizes the UPSA’s recordkeeping requirements as “an important and novel inducement to accurate recordkeeping.” *Id.*

89. UNIF. PROTECTED SERIES ACT, Prefatory Note n.4.

shields are conceptually and practically quite different from the traditional, “vertical” shield that protects the owners of an organization from automatic, vicarious liability for the organization’s obligations.⁹⁰

The NCCUSL Committee explains its decision to use a new term as follows:

Following long-standing practice with statutory trusts and investment companies, existing protected series statutes use “series” as the term of act for the construct just described. However, outside the investment trust context, using “series” can be quite confusing. “Series” has an established and very different meaning with regard to bonds, corporate stock, etc. To avoid confusion, this act uses the term “protected series”—to signal the different meaning and to call attention to the internal, horizontal shields which are the construct’s defining characteristic.⁹¹

V. AREAS IN WHICH TEXAS LAW AND THE UPSA AGREE

The Texas series LLC statute agrees with the USPA’s provisions that the registered agent for the series LLC is the registered agent for each series, that a series is in good standing only if the series LLC is in good standing, and that the periodic report of the series LLC must also report for each of its series.⁹²

VI. AREAS NOT ADDRESSED BY THE UPSA

The USPA does not, and rightly does not, try to bring any clarity to the UCC and securities law issues that arise with respect to series LLCs.⁹³

VII. CONCLUSION

As stated previously in this article, the author believes that the UPSA contains several provisions that the Texas Legislature should consider favorably for inclusion in the Texas series LLC statute. These are the provisions for filing a public designation each time a series LLC forms a series,⁹⁴ the provisions for keeping records of the assets of a series LLC and its series and the related liability rules,⁹⁵ possibly some clarification of how the information rights provisions apply to series LLCs and their series,⁹⁶ and possibly some clarification of how the duties

90. *Id.*

91. *Id.*

92. TEX. BUS. ORGS. CODE ANN. § 101.609 (West 2012); UNIF. PROTECTED SERIES ACT §§ 203, 205, 206 (UNIF. LAW COMM’N 2017).

93. *See Sparkman, supra* note 34, at 35–38.

94. UNIF. PROTECTED SERIES ACT § 201 (UNIF. LAW COMM’N 2017).

95. *Id.* §§ 301, 401–04.

96. *Id.* § 305, cmt.

of governing persons apply in the series context.⁹⁷ The author has previously expressed skepticism that series LLC are a good idea.⁹⁸ The author's goal in writing this article is to improve the Texas series LLC provisions.

97. *Id.* §§ 108, 304, cmt.

98. *See* Sparkman, *supra* notes 3 & 34.