Delaware Alternative Entities—The Benefits and Burdens of Contractual Flexibility

By Norman M. Powell

Real estate lawyers are expected to be conversant, if not expert, in a great many areas of law. These include zoning and land use, secured transactions, debtor-creditor, general commercial law and contracts, corporate and alternative entity law, and third-party legal opinions. Increasingly, lenders, rating agencies, and others involved in credit markets require that certain types of real estate assets be held in Delaware limited liability companies (Delaware LLCs) or, on occasion, Delaware statutory trusts (DSTs) with specific attributes. Many issues presented by the formation and use of such entities are governed, to a significant extent, by contractual terms crafted for inclusion in the entity's governing instrument, which may supplement or even supersede statutory provisions.

The Delaware Limited Liability Company Act (Delaware LLC Act), Del. Code Ann. tit. 6, § 18-101 et seq., and the Delaware Statutory Trust Act (DST Act), Del. Code Ann. tit. 12, § 3801 et seq., facilitate the formation of Delaware LLCs and DSTs with attributes carefully crafted to meet the needs of a given application and are regularly revised to best assure that Delaware LLCs and DSTs can be crafted to meet the ever-developing needs of the marketplace. Both the Delaware LLC Act and the DST Act explicitly invoke Delaware's policy to give "maximum effect to the principle of freedom of contract and to the enforceability" of limited liability company agreements and DST governing instruments. See Delaware LLC Act § 18-1101(b) and DST Act § 3825(b). In addition, since the mid-1990s the Delaware LLC Act has permitted the formation of Delaware LLCs with separate series of members, managers, and assets; this authorizes the Delaware LLC to restrict liability for debts, liabilities, obligations, and expenses for a particular series to the assets of such series only, insulating the assets of the limited liability generally. Delaware LLC Act § 18-215. The use of such series is beginning to surface.

The flexibilities and advantages afforded by these Delaware statutes, intended as they are to address the diverse needs of various constituencies, present unique issues and risks to those forming, using, or opining on such entities. This article discusses key features of alternative entities; the formation of Delaware LLCs and DSTs; certain cautions for those providing, or receiving, legal opinions on alternative entities; unique issues that arise when LLCs with series become debtors for Uniform Commercial Code Article 9 purposes; and questions concerning LLCs with series (and the series themselves) as debtors under the Bankruptcy Code.

Norman M. Powell is a partner in the Wilmington, Delaware, law firm of Young Conaway Stargatt & Taylor, LLP.

Alternative Entities and Their Uses

Alternative entities that own real estate formed with certain characteristics facilitate outcomes not feasible for traditional operating companies, including legally isolating assets in a given transaction from the consequences of a future insolvency. Lenders to the entity, and purchasers of notes and other obligations issued by the entity, are able to rely on the creditworthiness of the isolated assets and disregard the creditworthiness of the original property owner. These so-called special purpose entities (SPEs) typically feature some measure of "bankruptcy remoteness." That is, they have features that reduce the availability of their assets to satisfy creditors in a bankruptcy proceeding.

The typical SPE is bankruptcy-remote in two primary ways, each of which is made possible by its governing law. First, the SPE is structured and formed to render it less likely that the SPE's assets will be made available to creditors of the originating entity in the case of the originating entity's future bankruptcy. The SPE is structured as a separate legal entity under state law, distinct from its members or owners, managers, and the transferor of its assets. Whether as a function of such law or as a function of provisions incorporated into the governing agreement and enforceable under such law, the SPE's members or owners (including their trustees in bankruptcy) and their creditors are denied rights in any specific SPE assets and any right to exercise legal or equitable remedies for any specific SPE assets. Second, the SPE is structured to render it less likely that the SPE itself will become a debtor in a bankruptcy proceeding. Being a limited purpose entity, the SPE has no assets or liabilities except those specifically transferred to it or assumed by it in connection with the transaction at hand. Under its governing agreement, it has neither power nor authority to hold assets or incur liabilities unrelated to the transaction at hand.

As a further safeguard against SPE bankruptcy, the governing agreement often creates the role of an independent director or other independent decision maker whose affirmative vote or other action is necessary (in addition to whatever other action is generally required for the entity to

take action) for the SPE to file a voluntary petition for bankruptcy relief. The decision maker must be independent of the originating entity and the member or owner of the SPE (for example, it cannot serve on the board of directors or in another decision-making capacity for the originating entity or the member or owner of the SPE). Foreseeable circumstances can present decision makers with conflicting duties to entities and their members or owners to and lenders and other third parties with whom those entities have dealings. An SPE should be formed under law that permits, and its governing agreement should provide for, the modification or elimination of potentially conflicting duties (including fiduciary duties) such that the independent decision maker can serve the desired purpose without facing such conflicts.

An SPE should be formed under law that provides, or permits its governing agreement to provide, that the bankruptcy of a member or owner does not cause the SPE to terminate or dissolve. In the context of a single-member limited liability company SPE, this is done in part by creating the role of the "springing member" under the governing agreement. Essentially, the springing member is a person who has agreed to become a special member automatically on the occurrence of an event specified in the governing agreement (for example, the last member of the LLC ceases to be a member). Before becoming a special member, the springing member is not a member of the LLC and has no LLC interest. After progressing from springing member to special member, such member is a member solely for the purpose of preventing the SPE from terminating for lack of any members, and typically

- has no interest in the profits, losses, and capital of the SPE,
- has no right to receive any distributions of the SPE's assets,
- is not required to make any capital contributions to the SPE, and
- does not receive an LLC interest in the SPE.

The special member, in its capacity as such, generally has no power or authority to act for or bind the SPE and no right to vote on, approve, or otherwise consent to any action by, or matter relating to, the SPE. The ability to create so limited a role for a member must find support in the relevant statute.

Forming a Delaware LLC

Generally, a Delaware LLC is formed at the time of the filing of a certificate of formation in the office of the Secretary of State of the State of Delaware (Secretary of State), or at any later time specified in such certificate. The certificate of formation must set forth the name of the Delaware LLC and the address of the registered office and the name and address of the registered agent for service of process on the Delaware LLC and may include a future effective time for such certificate and such other matters as the members determine. Delaware LLC Act § 18-201. The certificate must be executed by one or more authorized persons. Id. § 18-204. "Authorized person" is not defined in the Delaware LLC Act, so authorization is typically memorialized in the LLC agreement. An LLC agreement may be entered into by the member (the Delaware LLC Act explicitly permits single-member LLCs) or members of the Delaware LLC before, after, or at the time of the filing of a certificate of formation and, regardless of when entered into, may be made effective as of the formation of the Delaware LLC or at such other time as is provided therein. Id. § 18-1101. Although an LLC agreement can be written, oral, or implied, Delaware LLCs used in structured finance transactions, and Delaware LLCs for which legal opinions will be delivered, consistently have written agreements.

Unlike corporate law statutes, the Delaware LLC Act provides little in the way of operational requirements or procedures for managers, officers, and directors.

When a Delaware LLC is formed as an SPE, its LLC agreement explicitly limits its powers and authorities to those necessary to its special purpose. Unless otherwise provided in its LLC agreement, a Delaware LLC is managed by its members in proportion to their interests in its profits, with a simple majority of such interests controlling. Thus, alternative allocations of managerial authority among members can be achieved but must be set out in the LLC agreement. Similarly, a Delaware LLC may be managed, in whole or in part, by a manager (who need not be a member). Id. § 18-401. Managers can be further designated as officers, directors, or otherwise. Unlike corporate law statutes, the Delaware LLC Act provides little in the way of operational requirements or procedures for managers, officers, and directors—any such matters, to the extent relevant, should be addressed comprehensively in the LLC agreement.

Forming a Delaware Statutory Trust

Generally, a Delaware statutory trust or DST is formed at the time of the filing of a certificate of trust in the office of the Secretary of State or at any later time specified in such certificate. The certificate of trust must set forth the name of the Delaware statutory trust and the name and business address of at least one of the trustees meeting the residency requirements set forth in DST Act § 3807 (for example, having its principal place of business in Delaware) and may include a future effective time for such certificate and such other matters as the trustees determine. Id. § 3810. The certificate must be executed by all trustees, whose appointment as such, rights, and duties are set forth in a

governing instrument. Id. § 3811. Every DST must have a governing instrument.

When a DST is formed as an SPE, its governing instrument explicitly limits its powers and authorities to those necessary to its special purpose. Unless otherwise provided in its governing instrument, a DST is managed by or under the direction of its trustees. As noted above, each DST must have at least one trustee meeting certain Delaware residency requirements. The DST Act provides complete flexibility as to how many additional trustees, if any, a DST may have, and as to the allocation of responsibilities among them. For example, a DST might have one trustee who both satisfies the residency requirements of DST Act § 3807 and manages the business and affairs of the statutory trust. Alternatively, a DST might have multiple trustees, one participating in the statutory trust solely to satisfy the residency requirements of DST Act § 3807, and the other(s) responsible for all other matters, including day-to-day administration of the DST and its affairs. The governing instrument can entitle any person, including a beneficial owner, to direct the trustees or other persons in the management of the statutory trust, and unless the governing instrument so provides, neither such power nor its exercise causes such person to be a trustee or to have duties (including fiduciary duties) or liabilities relating thereto to the statutory trust or to a beneficial owner thereof.

Delaware LLCs and Legal Opinions

The TriBar Opinion Committee, a group including lawyers who frequently participate in delivering and receiving legal opinions (TriBar), recently released a report on the customary practices for issuing legal opinions on LLCs. Tri-Bar Opinion Committee, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (2006) (Tribar Report). The Tribar Report speaks to opinions on status (the LLC's status as a limited liability company duly formed and validly existing in good standing), power (the LLC's power to enter into and perform its obligations under specified documents), action (the LLC's authorization, execution, and delivery of specified documents), and enforceability of LLC agreements.

The Tribar Report speaks in large part to the practice of issuing LLC opinions that purport to be limited to the relevant limited liability company act or statute—for instance, the Delaware LLC Act. Such opinions follow the practice that has evolved regarding opinions delivered under the Delaware General Corporation Law (DGCL), Del. Code Ann. tit. 8, § 101 et seq.; but Delaware LLCs differ fundamentally from corporations for opinion purposes. As discussed above, Delaware's stated policy is to give "maximum effect to the principle of freedom of contract and to the enforceability" of limited liability company agreements. Indeed, it is only because this principle gives effect to the contractual provisions discussed above that many Delaware LLCs come to possess the very attributes on which interested parties most heavily rely in their dealings with the Delaware LLC.

The Tribar Report expresses the view that status, power, and action opinions on Delaware LLCs cover not only the Delaware LLC Act but also applicable contract and case law, including cases applying fiduciary duty concepts, unless they are expressly excluded. Although the TriBar did not reach consensus on whether such an express limitation effectively excludes from status, power, and action opinions on issues of contract law that such opinions otherwise would cover, the Tribar Report notes that a literal reading of the coverage limitation (that is, exclusion of such contract law issues) would be at odds with the Delaware LLC Act's overarching deference to the terms of the operating agreement as superseding the default rules contained in the Delaware LLC Act. 61 Bus. Law. at 681–82.

Opinion preparers who cannot opine on Delaware contract law generally should not opine on the enforceability of Delaware LLC agreements. The Delaware LLC Act contains provisions—and deference to freedom of contract—without analogue in the DGCL. Although these can give rise to unique issues relevant to status, power, and action opinions, they are perhaps most compelling in the context of enforceability opinions. The Tribar Report finds that enforceability opinions of necessity embrace state contract law, covering as they do all provisions of the operating agreement and not merely those applicable to status, power, and action.

By reading and studying a statute, lawyers can begin to understand what it means. Yet, that meaning is to be derived from case law as well. When there is little case law directly on point, a court may properly analogize to other contexts or cases it finds instructive. The entire body of statutory and case law to which the court might properly turn is therefore relevant. Thus, opinion givers should consider that limitation to the Delaware LLC Act may not effectively limit their opinions as they intend, and opinion recipients should consider that an opinion effectively limited to the Delaware LLC Act provides little comfort on the matters addressed to the extent they go beyond the language of the Delaware LLC Act, particularly those relating to enforceability of the LLC's operating agreement.

The DST Act provides complete flexibility as to how many additional trustees, if any, a DST may have, and as to the allocation of responsibilities among them.

Although the marketplace has evolved certain standards and expectations regarding opinions on the bankruptcy-remote attributes of Delaware LLCs, expectations are less developed for DSTs. As noted above, though the DST Act contains certain provisions

paralleling those in the Delaware LLC Act (notably, freedom of contract and limitation of rights to and against assets of the DST), case law supporting enforceability of certain bankruptcy-remote provisions of DSTs is less developed and its application by analogy in some respects less certain.

Series LLCs and Secured Transactions

For some years, the Delaware LLC Act has permitted the formation of Delaware LLCs with separate series of members, managers, and limited liability company interests. In 2007, certain provisions of the LLC Act relating to the holding of assets associated with a series were amended. Delaware LLC Act § 18-215. The new provisions provide maximum flexibility and so accommodate the needs of a great many constituencies. Inevitably, some options are better suited to some applications than others. There is an interesting interplay between these provisions and perfection of security interests by filing under Article 9 of the Uniform Commercial Code. U.C.C. § 9-101 et seq. (Article 9).

Those dealing with the creation and perfection of security interests in assets associated with a series of a Delaware LLC must be particularly careful in identifying their "debtor" and in answering each question that follows from that threshold issue.

Those dealing with the creation and perfection of security interests in assets associated with a series of a Delaware LLC must be particularly careful in identifying their "debtor" (that is, the person having an interest in the collateral at issue, within the meaning of Article 9 § 102(a)(28)) and in answering each question that follows from that threshold issue. In the years since the comprehensive revisions to Article 9 took effect in 2001, most lawyers have become comfortable that a Delaware LLC is a "registered organization" within the meaning of Article 9 § 102(a)(70). Thus, a Delaware LLC is "located" in Delaware under section 9-307(e), and a financing statement identifying a Delaware LLC as "debtor" must feature the Delaware LLC's name in box 1a as indicated in Article 9 § 503(a)(1) and be filed in Delaware under Article 9 § 301. Things may be very different if one is considering assets associated with a series. The current Delaware LLC Act provides in relevant part as follows:

> (b) . . . Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise. . . .
>
> (c) A series established in accordance with subsection (b) of this section . . . shall have 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.

Delaware LLC Act § 18-215.

For assets of a given series, who is the "debtor" within the meaning of Article 9 § 102(a)(28)? Possibilities would seem to include the Delaware LLC itself, the series, and a nominee.

If the Delaware LLC itself is the debtor, Article 9 would seem to require an ordinary filing against and naming of the Delaware LLC as debtor in the Delaware LLC's location (that is, Delaware). Matters unique to the series might be addressed in the collateral description or in box 10 (miscellaneous) of the financing statement addendum, as appropriate.

If a nominee is the debtor, one must consider whether that nominee is an organization, a registered organization, an individual, or something else. An effective filing against the assets of the corresponding series would be filed such nominee's location (which may not be Delaware) as determined under the applicable subpart of Article 9 § 307 and name the nominee (only) in box 1a (or box 1b, if applicable) in deference to the applicable subpart of Article 9 § 503.

If the series is the debtor, one must consider whether it is an organization, a registered organization, or something else. "Organization" is defined in U.C.C. § 1-201(b)(25) as "a person other than an individual." "Person," in turn, is defined in U.C.C. § 1-201(b)(27) as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity." Is it sufficiently clear whether a series is a legal or commercial entity? Article 9 appears to contemplate that debtors to which it applies are either individuals or organizations (see, e.g., Article 9 § 307(b)), with some organizations belonging in the subcategory "registered organization." It would seem that the Article 9 definition of "registered organization" does not fit a series of a Delaware LLC—the Secretary of State does not necessarily maintain any public record showing a given series to have been organized (let alone showing its name), and the Delaware LLC as a whole is issued a single organizational identification number. On balance, then, this particular option for holding series assets may leave Article 9 secured parties without the degree of certainty and confidence to which they have become accustomed.

As suggested above, having determined who the "debtor" is for the relevant assets and having had such debtor effectively grant the desired security interest, interested parties must determine the proper characterization of such debtor for purposes of determining where to file a financing statement against it and determine its name and other information for purposes of completing such financing statement. If the debtor is the Delaware LLC itself, these questions are easily answered. If the debtor is a nominee, these questions should be easily answerable by

consideration of the relevant attributes of that nominee under Article 9. If the debtor is the series, questions remain about the characterization of the debtor and thus its location for purposes of Article 9 § 307 (that is, where to file), and what name, organizational identification number (if applicable—Delaware does not require organizational identification numbers on financing statements), and other identifying information to provide on a financing statement (that is, what to file).

Series LLCs and the Bankruptcy Code

The interplay between Delaware LLCs with separate series and the Bankruptcy Code, 11 U.S.C. §§ 101 et seq., as amended is still more uncertain. If a Delaware LLC with separate series (Series LLC) becomes a "debtor" within the meaning of the Bankruptcy Code, are its separate series (each, a series) likewise debtors? Are the Series LLC and its various series all one and the same debtor? Is it possible for a series, to the exclusion of the Series LLC, to be a debtor within the meaning of the Bankruptcy Code? Or could it be that, regardless of how these questions are answered, assets of a series will not be available to creditors of another series or the Series LLC?

The Bankruptcy Code provides that "[t]he term 'debtor' means [a] person . . . concerning which a case . . . has been commenced." Bankruptcy Code § 101(13). In turn, "[t]he term 'person' includes individual, partnership, and corporation . . . ." Id. § 101(41). Finally,

> [t]he term "corporation" . . . includes . . . (i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust; but . . . does not include limited partnership.

Id. § 101(9). It would seem clear that a great many Delaware LLCs, whether with or without series, will fit this definition of corporation, though it would seem at least theoretically possible to form a Delaware LLC in which each attribute enumerated in the definition of "corporation" is disclaimed or renounced by language in the limited liability company agreement, which language should be given effect under the Delaware LLC Act ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements"). Delaware LLC Act § 18-110(b). Note that the definitions of both "person" and "corporation" purport to include, but not to be limited to, the illustrative examples that follow. But even if we conclude, as we likely will, that a Series LLC with separate series can be a debtor under the Bankruptcy Code, what does that mean for assets held in series?

It may be helpful to consider these questions in terms of three conceptual models. The first such model (the Single-Entity Model) would regard the Series LLC and its series as one and the same legal entity. Under this model, when a Series LLC is a debtor, its series are constituent parts of that debtor. It would seem doubtful that such series could themselves be debtors separate and apart from their Series LLC. The second such model (the Multi-Entity Model) would regard the Series LLC and its various series as distinct legal entities. A Series LLC could be a debtor, as could any of its series, but the bankruptcy of any one would not directly affect the others. The third such model (the Quasi-Trust Model) would focus not on the question of entity status, but rather on the fact that a Series LLC has no beneficial interest in assets held in series, nor does a series have a beneficial interest in assets held in a separate series, in each case unless otherwise provided in the limited liability company agreement.

The Single-Entity Model finds support in the Delaware LLC Act, which provides that series terminate on the dissolution of the Series LLC. Id. § 18-215(k). That is, series cannot exist absent the continued existence of a Series LLC, a fact that suggests series are something other than separate and distinct entities. Additional provisions of the Delaware LLC Act and other Delaware entity laws support the inference that the legislature intended series be treated as part of the same entity as the Series LLC, not as separate entities distinct from it.

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Delaware business entities generally can only be created by filing something with the Secretary of State. See id. § 15-1001 (requiring limited liability partnership to file statement of qualification); id. § 17-201 (requiring certificate to be filed for limited partnership); id. § 18-201 (requiring certificate to be filed for Delaware LLC); Del. Code Ann. tit. 8, § 106 (commencing corporate existence on filing of certificate of incorporation); DST Act § 3810 (requiring statutory trust filing). Partnerships are an exception. They may, but are not required to, file a statement of existence with the Secretary of State. Del. Code Ann. tit. 6, § 15-303. At common law, however, partnerships were not considered entities. See, e.g., *Bergstrom v. Ridgway-Thayer Co.*, 103 N.Y.S. 1093 (Sup. Ct. 1907) ("A partnership, unlike a corporation, is not an entity."). Series, on the other hand, need not file

anything with the Secretary of State. Delaware LLC Act § 18-215. Instead, there is only inquiry notice about the existence (or possible future existence) of a series. See id. § 18-215(b) (requiring that a certificate of formation provide notice if a limited liability agreement establishes or provides for the establishment of series).

Under the Multi-Entity Model or the Quasi-Trust Model, by contrast, a Series LLC and its series could be separate entities, or perhaps separate beneficial interests, because a series has the ability to "contract, hold title to assets . . . and sue and be sued." Id. § 18-215(c). To be a separate entity, an organization "must have a legal identity apart from its members." *In re Valley Media, Inc.*, 279 B.R. 105, 127 (Bankr. D. Del. 2002). The ability to contract, hold assets in its name, and sue and be sued would likely establish a separate legal identity for the organization. Thus, it is possible that a bankruptcy court could hold that the Series LLC and its series are different legal entities.

Although a Series LLC may or may not have a legal interest in assets of a series, it has no beneficial interest in such assets unless the LLC agreement gives rise to such beneficial interest.

To embrace the Multi-Entity Model would require concluding that the Delaware legislature, in a significant and yet subtle change to long-standing policy, had chosen to allow the formation of entities without filing with the Secretary of State any document specifically identifying them. This would seem to suggest that the Multi-Entity Model is to be disfavored. Yet the Single-Entity Model would seem to frustrate a primary purpose of Delaware LLC Act § 18-215(b). What is left, then, is the Quasi-Trust Model. It is consistent with the explicit provisions of Delaware LLC Act § 18-215(b) ("[U]nless otherwise provided in the limited liability company agreement, 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 thereof shall be enforceable against the assets of [a given] . . . series"). It is consistent with bankruptcy law. "To determine whether the Debtor ha[s] a legal or equitable interest [in assets of the series] . . . , we must look to state law." *Bake-Line Group, LLC v. Consol. Foods, Inc.*, 359 B.R. 566, 570 (Bankr. D. Del. 2007) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). Under Bankruptcy Code § 541(a)(1), "all legal or equitable interests of the debtor" are property of the estate. Regardless of whether assets are in the name of the Series LLC, in the name of the series, or otherwise, the applicable state law provides that the assets of a series cannot be used to pay the debts of another series or of the Series LLC unless the LLC agreement so provides. That is, although a Series LLC may or may not have a legal interest in assets of a series, it has no beneficial interest in such assets unless the LLC agreement gives rise to such beneficial interest. Under the Quasi-Trust Model, the language of the Delaware LLC Act can be given meaning consistent with existing bankruptcy law. But because a series cannot exist beyond the life of its related Series LLC, a proceeding on behalf of Series LLC under Chapter 7 of the Bankruptcy Code may nonetheless require disposition of series assets.

Of course, some might argue for application of the doctrine of substantive consolidation, by which a bankruptcy court may consolidate the assets and liabilities of multiple debtor entities, or of a debtor entity and one or more nondebtor entities, allowing creditors of one entity to reach assets of the other entities notwithstanding each entity's independent legal existence under applicable nonbankruptcy law. Substantive consolidation is a construct of federal common law and arises from the bankruptcy court's equitable powers. See *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005). Some have also found a statutory basis for substantive consolidation in Bankruptcy Code §§ 105(a) (bankruptcy court's general equitable powers), 302(b) (permitting consolidation of joint cases filed by married individuals), and 1123(a)(5)(C) (permitting a Chapter 11 plan to provide for the "merger or consolidation of the debtor with one or more persons"). As an equitable doctrine, it does not admit of formulaic application, and apart from a salutary mention in a 1941 Supreme Court opinion (stating, arguably in dictum, that the bankruptcy referee had the authority to substantively consolidate a debtor and nondebtor entity), there is no guiding authority from the Supreme Court as to when the doctrine may be applied. See *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941). In 2005, the Third Circuit noted there was no reason to believe substantive consolidation was limited to a particular type of entity. *In re Owens Corning*, 419 F.3d at 209 n.13. Under the Single-Entity Model, there is no need to resort to substantive consolidation. Under the Multi-Entity Model, presumably the doctrine would be applied (or found inapplicable) in the usual way. Under the Quasi-Trust Model, one might conceivably argue against SubCon on the basis of the Bankruptcy Code itself.

Bankruptcy Code § 541(c)(2) provides that "[a] restriction on the transfer of the beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a [bankruptcy] case . . . ." Thus, to the extent the series construct permitted by Delaware LLC Act § 18-215 were viewed as a restriction on the transfer of a given series's beneficial interest in assets to a consolidated bankruptcy estate of the Series LLC or another series, Bankruptcy Code § 541(c)(2) can be read as abrogating the power to substantively consolidate (because, to the extent substantive consolidation is premised on Bankruptcy Code § 105(a), it cannot overstep statutory bounds established elsewhere in

the Bankruptcy Code). Additional support can be found in Bankruptcy Code § 541(d), which provides that property

> in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Under this view, even the titling of series assets in the name of the Series LLC would not compromise separateness.

Conclusions

Alternative entities provide extraordinary flexibility and can be formed with characteristics chosen to facilitate outcomes not feasible for corporations and other traditional operating companies. Such characteristics include legal isolation of assets in a given transaction from the consequences of a future insolvency, special mechanisms to better assure continuity of existence, and modification of fiduciary and other duties. Formation of both Delaware LLCs and DSTs requires the filing of a short and simple certificate with the Secretary of State and generally includes drafting of an operating agreement endowing the entity with the special attributes desired in the application at hand. Thus, many of the most sought-after and bargained-for attributes of alternative entities are a function not of governing statutes but of carefully drafted operating agreements.

Lawyers who cannot comfortably opine on Delaware contract law generally should not opine on the enforceability of Delaware LLC agreements or DST agreements. Those providing legal opinions should consider that a purported limitation to the Delaware LLC Act or the DST Act may not be effective. Those receiving legal opinions should consider that an opinion effectively limited to the Delaware LLC Act or the DST Act provides little comfort on the special attributes of the Delaware LLC or DST emanating from its operating agreement. There is an interesting interplay between the series provisions of the Delaware LLC Act and Article 9. Although the Delaware LLC Act facilitates the holding of assets associated with series in a number of different ways, some of these options present the would-be secured party with uncertainty about the identity of its debtor, its debtor's name, and how to complete and where to file a financing statement.

Finally, although it is clear that a Delaware LLC, including a Delaware LLC with separate series, can be a debtor under the Bankruptcy Code, it is unclear (1) whether a given series can be a debtor under the Bankruptcy Code and (2) the extent to which series assets may be available for inclusion in the bankruptcy estate of a Delaware LLC with separate series or a given series. Flexibility provides many benefits, but its cost is the burden of having to make appropriate choices. ■