

I. “OVERVIEW OF LLCs AND OTHER ENTITY OPTIONS”

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A. HISTORY AND TYPES OF LLCs

The first limited liability company statute enacted in the United States was Wyoming’s on March 4, 1977. As described in Susan Hamill’s article, “The Origins Behind the Limited Liability Company” (59 Ohio St. L.J.1459 (1998)), a Denver, Colorado-based oil company, Hamilton Brothers Oil Company, which had been involved in various international oil and gas exploration ventures using foreign LLCs, primarily the Panamanian limitada, “created an unincorporated domestic entity resembling the foreign limitada” (id. at 1464). It did so as a sort of test case to determine whether the combined benefits of limited liability for the owners and partnership taxation of the entity, benefits which had been approved by the I.R.S. for federal income tax purposes in several Private Letter Rulings issued earlier in the 1970s with respect to foreign and, primarily, Panamanian limitadas, would still be available if the entity were organized and operated in the United States. There were grave risks involved unless at least one domestic state authorized such an entity and it was domiciled there, because, typically, under the laws of most if not all states, anyone falsely purporting to act on behalf of a business corporation that was not in fact a corporation under the law of its state of domicile, would incur full personal liability for the entity’s liabilities. (There were also grave risks involved in operating any such authorized entity outside of its state of domicile, unless the other state(s) in which its operations were conducted also recognized the validity of such an entity for liability-limitation purposes, but the process had to start somewhere.)

In any case, Hamilton Brothers Oil Company, the above-mentioned oil and gas explorer, successfully lobbied the Wyoming legislature and governor for the passage of the first limited liability company legislation in the United States and, presumably, immediately reconstituted its above-mentioned “test case” entity as a Wyoming LLC. The company then applied for an I.R.S. Private Letter Ruling that this new domestic limited liability entity would qualify for partnership federal income tax treatment (id. at 1467).

More than three and one-half years later, the I.R.S. finally, grudgingly, issued the requested ruling (Priv. Ltr. Rul. 8106082 (Nov. 18, 1980)). However, prior to the release of that ruling, the I.R.S. also issued Proposed Treasury Regulation § 301.7701-2, 45 Fed. Reg. 75, 709 (1980), that would have denied partnership tax treatment to any LLC-type entity in which all the members were not personally liable for the entity’s debts.

In 1982, Florida became the second domestic state to authorize LLCs despite their extremely unsettled federal income tax status. It did so, apparently, in order to attract Latin American direct investment to that state due to the Latin American business community’s familiarity with that form of business organization, whatever its tax consequences.

At approximately the same time, the I.R.S. withdrew its Proposed Regulation and commenced a six-year study of the issue of LLCs’ proper tax classification. At the end of that study, the agency issued Revenue Rule 88-76, which accepted the Wyoming form of LLC as a partnership for federal income tax purposes. Importantly, the Wyoming statute then required, among other things, that an LLC would “dissolve upon the death, resignation, retirement, bankruptcy, expulsion, or dissolution of a member, or the occurrence of any other event that terminated the continued membership of a member in the LLC, unless the members unanimously agreed to continue the business” (Revenue Ruling 88-76 as quoted in S. Anderson, “The Illinois

Limited Liability Company: A Flexible Alternative for Business,” 25 Loy. U. Chi. L.J. 55, 63 (1993)). It also required the unanimous consent of all the members to the admission of any new LLC member.

Many more states, including Illinois, thereafter enacted such so-called “first generation” LLC statutes, conforming more or less closely to the requirements of Wyoming’s. Illinois’ statute was enacted on September 11, 1992, and first became effective on January 1, 1994. The I.R.S. first acknowledged the partnership tax status of an Illinois LLC in Rev. Rul. 93-49, 1993-25 I.R.B. 11, again involving an LLC that would automatically dissolve upon the termination of the membership of any member unless, within ninety days after that or any other dissolution event, all the remaining members voted to continue the business, and that could likewise admit no new members without the consent of all the existing members.

Such limitations obviously diminished the attractiveness of LLCs for many sorts of potential uses despite the increasing “buzz” about them in the legal world. The full benefits of LLCs only began to be realized – and to be recognized by most cautious practitioners – with the I.R.S.’s adoption of its “check-the-box” regulations in December 1996 (see Treas. Reg. § 301.7701). Under these regulations, it was no longer necessary for practitioners to agonize about whether a particular LLC might exhibit too many “corporate” characteristics such as “centralization of management,” “continuity of life,” or ready “transferability” of ownership interests, to qualify for partnership tax treatment. Instead, thereafter, all multi-member LLCs that did not elect otherwise were automatically deemed to be partnerships for federal income tax purposes, and all single-member LLCs, sole proprietorships, i.e., tax nonentities.

These seminal regulations promptly led to the adoption of much more liberal “second generation” LLC statutes in most of the states (including Illinois) that had previously authorized

LLCs, and to the enactment of similar LLC legislation in every other state and the District of Columbia. Thus, effective January 1, 1998, the Illinois statute was essentially completely rewritten. It thereafter, among other things, permitted single-member LLCs, permitted LLCs to be formed for any lawful purpose whether or not a for-profit purpose (such as required for partnerships), permitted LLCs' managers to enjoy limited liability and indemnification rights going even beyond those permitted for corporate directors, excused the nonmanager members of manager-managed LLCs from any fiduciary duties toward those companies or their members, permitted LLCs of perpetual duration, permitted conversions of other entities into LLCs and mergers of LLCs with such entities, both domestic and foreign, and greatly narrowed the circumstances in which the termination of an LLC membership would cause the dissolution of the LLC itself.

With the addition of an amendment in 2001 expressly declaring that, except in a few instances, an LLC's operating agreement could supersede all the other rules, i.e., the "default" rules, of the statute, another amendment in 2004 denying the power of any member of a manager-managed LLC to dissociate from the company prior to its winding up and dissolution except if and as specifically allowed by the operating agreement, and another in 2005 authorizing Series LLCs if and as properly specified in the Article of Organization and the operating agreement (provided that completely separate accounts are kept for the respective Series), the 1998 restatement of the statute has brought us to its present, almost completely "contractarian" state. (See W. Carney, "Limited Liability Companies: Origins and Antecedents," 66 U. Colo. L. Rev. 855 (1995), finding the origin of this contractarian approach in the United States to be the former joint stock association and/or the partnership association once recognized in a few states, not the highly regulated European GmbH or Latin American limitada).

There are now at least four different polarities of opposing types of LLCs recognized as valid in Illinois: manager-managed versus member-managed although member management may be entirely by elected managers, the only difference then being that a manager-managed LLC must be so designated in its Articles of Organization; multi-member versus single-member; Series LLC versus unitary; and domestic versus foreign. (A foreign LLC authorized to transact business in Illinois is governed by the LLC law of its state or country of domicile, however different that may be from Illinois' LLC law.) To these might be added multi-purpose versus single-purpose LLCs, the latter of which are often required by major commercial real estate lenders – and required to be managed by separate management entities also restricted to that single purpose – in order to ensure the priority and complete exclusivity of their security interests without concern about other projects or lenders.

The next section of this discussion considers these polarities in the context of a general discussion of the current Illinois LLC statute.

B. THE LLC AS A LEGAL ENTITY

It should be reemphasized that the current Illinois LLC statute is almost completely contractarian in its nature. Nearly all of the Illinois LLC Act provisions are “default” provisions that only take effect where the parties have not otherwise agreed. The Illinois LLC Act itself essentially gives the members of an LLC complete latitude to modify the default provisions and create their own “contractual” entity, except in seven instances listed in § 15-5(b). The concept of the default provisions only taking effect when not otherwise agreed to by the parties is somewhat confusing because the drafters of the 1998 amendments to the Illinois LLC Act had purposefully left out the oft-cited “except as otherwise provided in the operating agreement” language at the beginning of various substantive provisions. Instead, a 2001 omnibus bill added

a single sentence to § 15-5(a) meaning to capture this language and apply it to the entire Act: “Except as provided in subsection (b) of this section, an operating agreement may modify any provision or provisions of this Act governing relations among the members, managers, and company.”

The seven non-waivable provisions listed in § 15-5(b) cannot be overridden by the operating agreement. These provisions generally relate to a member’s right to information and access of records, the company’s right to expel a member, the requirement of winding up the company in certain situations, the restriction of rights of a third party, the restriction of a member’s power to dissociate, the elimination or reduction of a member’s fiduciary duty, and the elimination or reduction of the obligation of good faith and fair dealing.¹

Formation

The statutory requirements for the formation of an Illinois LLC are quite simple and straightforward. In Illinois, an LLC is formed by filing Articles of Organization with the

¹ 805 ILCS 180/15-5(b). The operating agreement may not:

- (1) unreasonably restrict a right to information or access to records under Section 10-15;
- (2) vary the right to expel a member in an event specified in subdivision (6) of Section 35-45;
- (3) vary the requirement to wind up the limited liability company’s business in a case specified in subdivisions (3) or (4) of Section 35-1;
- (4) restrict rights of a person, other than a manager, member, and transferee of a member’s distributional interest, under this Act;
- (5) restrict the power of a member to dissociate under Section 35-50, although an operating agreement may determine whether a dissociation is wrongful under Section 35-50, and it may eliminate or vary the obligation of the limited liability company to purchase the dissociated member’s distributional interest under Section 35-60;
- (6) eliminate or reduce a member’s fiduciary duties, but may;
 - (A) identify specific types or categories of activities that do not violate these duties, if not manifestly unreasonable; and
 - (B) specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate these duties; or
- (7) eliminate or reduce the obligation of good faith and fair dealing under subsection (d) of Section 15-3, but the operating agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

Secretary of State and paying the applicable fee (currently \$500.00).² Thereafter, the LLC must submit an Annual Report each year by its anniversary date together with a \$250.00 filing fee.

The Articles must contain: (1) the name of the LLC and the address of its principal place of business³; (2) the purposes for which the limited liability company is organized⁴; (3) the name of its registered agent and address of its registered office; (4) whether the LLC is to be managed by a manager or managers, or members, and the names and addresses of the initial manager(s) or member(s) respectively; (5) the latest date, if any, upon which the LLC is to dissolve and other events of dissolution, if any, that may be agreed upon by the members; (6) the name and address of each organizer; and (7) any other provision that the members elect to set out in the articles of organization for the regulation of the internal affairs of the LLC. 805 ILCS 180/5-5. The Illinois LLC Act differs from the Illinois Business Corporations Act (“BCA”) in that the articles of organization for an LLC need not contain any information regarding capitalization.

² A Series LLC must pay \$750.00 filing fee to file its articles of organization and an additional filing fee of \$50.00 for each series to file a “certificate of designation.” A series LLC must also pay an additional \$50.00 for each series to file its annual report.

³ The LLC’s name must contain the terms “limited liability company,” “L.L.C.,” or “LLC”; and cannot contain terms that indicate another type of entity, such as “Corp.,” “L.P.,” or “Ltd.” 805 ILCS 180/1-10. After the 1998 amendments to the Illinois LLC Act, the name of an LLC must also be “distinguishable” from all other LLCs and Corporations and foreign LLCs registered or admitted to do business in Illinois. *Id.* Additionally, it is important to note that the principal place of business of the LLC specified in the articles of organization may be, but need not be, a place of business in Illinois--although the LLC’s registered agent must be an individual residing in Illinois, an Illinois Corporation, or a foreign corporation having a place of business in Illinois and authorized to transact business in the state. See § 180/1-35.

⁴ An LLC may state that its purpose is “the transaction of any or all lawful businesses for which limited liability companies may be organized . . .” §180/5-5 except that insurance business may be conducted by an LLC only if it is a member of a group including incorporated and individual unincorporated underwriters, and if, upon insolvency, it is subject to liquidation by the Director of Insurance. § 180/25-1. A disadvantage, however, of this unlimited stated purpose is that it does not provide notice to potential entrants into the marketplace that the LLC’s name is already in use for a particular type of business. Therefore, it is generally advisable to state the particular purpose of the particular LLC’s business and “the transaction of any or all lawful businesses for which limited liability companies may be organized . . .” language to provide notice to potential entrants of the LLC’s use of its name for a specific type of business and allow for expansion of the LLC’s operations in the future. That is desirable unless, of course, the members or lenders desire to limit the LLC’s business to a particular specified purpose. In that case, stating that single purpose in the Articles , and stating that it is the sole purpose of the LLC, puts the world on notice that the managers have no actual or apparent authority to conduct any other business.

The Illinois LLC Act provides that one or more persons may organize an LLC so long as they are over the legal age of 18. 805 ILCS 180/5-1. Organizers need not be members of the LLC, but the LLC must nevertheless have one or more members, which may themselves be legal entities. In contrast, and again emphasizing the flexibility of the LLC form of business ownership, a sole proprietorship *cannot* have more than one owner, a partnership *must* have more than one owner, and S corporations have restrictions on both the number and character of their owners. Noticeably absent from the Illinois LLC Act are any requirements for formal organizational meetings or resolutions such as are contained in the BCA and applicable in the corporate realm. However, if the operating agreement does require specified owners' meetings or notice requirements, those requirements must be strictly adhered to.

Single Member LLCs

In Illinois, LLCs can be formed with only one member. 805 ILCS 180/5-1(a). One-person LLCs can provide limited liability to individuals who would otherwise operate as a sole proprietorship or would hold potentially liability-creating assets as an individual. A single member of a one-person LLC must ensure that he, she, or it does not act in a way that would cause "piercing" of the limited liability veil (see the discussion of that issue below). For example, the single member should not commingle his or her personal funds with those of the LLC or treat the LLC's assets as his or her own.

The Illinois LLC Act provides that in an LLC with only one member, the operating agreement includes any of the following: (1) any writing, without regard to whether the writing otherwise constitutes an agreement, as to the company's affairs and signed by the sole member; (2) any written agreement between the member and the company as to the company's affairs; or

(3) any agreement, which need not be in writing, between the member and the company as to a company's affairs, provided that the company is managed by a manager who is a person other than the member. 805 ILCS 180/15-5(c). This is important because commonly a single member of an LLC does not execute a formal operating agreement to govern the relationship between the individual and the LLC. Without formally undertaking to complete an operating agreement, a single member may inadvertently bind himself, herself, or itself to terms stated in other documents that under the statute are treated as the functional equivalent of an operating agreement—even if the member did not intend the documents to have the same legal effect as an operating agreement.

Management & Decision-Making

In a member-managed LLC, it is the members of the LLC that have the management and decision-making powers in the absence of a provision in the operating agreement creating such powers in a manager; in a manager-managed LLC, the managers have such power under both the Articles and the operating agreement. The default provisions of the Illinois LLC Act provide that in a member-managed company, each member has equal rights in the management and conduct of the LLC's business, in general, any matter relating to the business of the company may be decided by a majority of the members, except as otherwise provided in § 15-1(c). 805 ILCS 180/15-1(a). The management and voting rights of members are without regard (and not in proportion) to the amount of any specific member's contributions or size of his or her membership interest—unless otherwise agreed in the operating agreement. However, subsection (c) of § 15-1 does provide that certain matters require the consent of all the members whether the

company is a member-managed or manager-managed LLC – again, unless otherwise agreed in the operating agreement. The unanimous consent of all the members is otherwise required for:

- (1) any amendment of the operating agreement;
- (2) any amendment to the articles of organization;
- (3) the compromise of any obligation to make a contribution;
- (4) the compromise, as among members, of any obligation of a member to make a contribution or return money or other property;
- (5) the making of any interim distributions (including any redemption of an interest);
- (6) the admission of any new member;
- (7) any use of the company's property to redeem an interest subject to a charging order;
- (8) any consent to dissolve the company under Section 35-1(a)(2);
- (9) any waiver of the right to have the company's business wound up and the company terminated;
- (10) any consent of members to merge with another entity; and
- (11) any sale, lease, exchange or other disposal of all, or substantially all, of the company's property.

805 ILCS 180/15-1(c).

With respect to a manager-managed LLC, the default provisions give each manager equal rights in the management and conduct of the company's business and (subject to subsection (c) described above) provide that a majority of managers may decide any matter relating to the business of the company. 805 ILCS 180/15-1(b). If there is only one manager, he, she, or it may exclusively decide any matter relating to the LLC's business – again, subject to any contrary provision in the operating agreement and the unanimous consent requirement of § 15-1(c) in the absence of any such contrary provision. 805 ILCS 180/15-1(b).

Authority/Agency of Members/Managers

A member's or manager's actual and apparent authority to act on behalf of, and bind the LLC, are governed by the principles of agency and are identified in the Illinois LLC Act. Specifically, the Illinois LLC Act holds an LLC liable for any loss or injury caused to a person,

or for penalties incurred, as a result of a wrongful act or omission, or other actionable conduct, caused by a member or manager acting in the ordinary course of the company's business or with the authority of the company. 805 ILCS 180/13-10.

The Illinois statute also expressly provides that in a member-managed LLC, the members have the authority to bind the LLC through individual action taken on behalf of the entity (such as entering into a contract) unless the articles of organization or operating agreement restrict this authority. 805 ILCS 180/13-5(a).⁵ A member is said to have "actual authority" to bind the LLC if the member's act is authorized by the other members and "apparent authority" to bind the company if the member's act is to carry on, in the ordinary course, the LLC's business or business of the kind carried on by the LLC. An LLC will not be bound by a member's act only when the member had no actual authority *and* the third party with whom the member dealt knew or had notice that the member lacked authority to deal in the matter. 805 ILCS 180/13-5(a)(1).

In a manager-managed LLC, each manager is considered an agent of the company, while the members are not considered agents of the company solely by reason of being a member of the LLC. An act of a manager carrying on, or apparently carrying on, the business of the LLC will bind the company, again, unless the manager had no authority to act and the person with

⁵ 805 ILCS 180/13-5(a): Subject to subsections (b) and (c):

(1) Each member is an agent of the limited liability company for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on, in the ordinary course, the company's business or business of the kind carried on by the company binds the company, unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority.

(2) An act of a member that is not apparently for carrying on, in the ordinary course, the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members).

whom the manager was dealing knew or had notice that the manager lacked authority. 805 ILCS 180/13-5(b).

A third important provision in the Illinois LLC Act on this point relates to a member's or manager's authority to transfer or affect an LLC's interest in real property. The Illinois LLC Act provides that unless the articles of organization limit their authority, a member of a member-managed company, or a manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property. 805 ILCS 180/13-5(c). An instrument so transferred is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. 805 ILCS 180/13-5(c). Therefore, without a provision in the articles of organization to the contrary, a member or manager can effectively transfer any real property of the LLC to a third party without actual or express authority of the company, so long as the third party is without knowledge of the person's lack of authority to do so. Limitation on the authority to transfer or affect real property of the LLC is an important consideration when completing and filing the articles of organization.

Finally, the rules of agency in either type of LLC differ after the LLC's dissolution and after a member's dissociation. After dissolution, the LLC is bound by a member's or manager's act that (1) is appropriate for winding up the LLC's business; or (2) that would have bound the LLC before dissolution, if the other party to the transaction did not have notice of the dissolution. 805 ILCS 180/35-7(a). For a period of two years after a member's dissociation without the LLC's winding up, an LLC will be bound by a dissociated member's act that would have otherwise bound the LLC if a third party to the transaction reasonably believed that the

dissociated member was then a member of the LLC and did not have notice of the member's dissociation. 805 ILCS 180/35-70.

General Standards of Conduct for Members and Managers

The state statute also sets out general standards of conduct in the course of business for members and managers of an Illinois LLC. In general, both members and managers owe the company and its other members a duty of loyalty and duty of care. Specifically, a member's duty of loyalty to a member-managed company and its other members includes the following:

- (1) to account to the company and to hold as trustee for it any property, profit, or benefit derived by the member in the conduct or winding up of the LLC's business or derived from the use by the member of company property (including the appropriation of a company's opportunity);
- (2) to act fairly when a member deals with the company in the conduct or winding up of the company's business as or on behalf of a party having an interest adverse to the company; and
- (3) to refrain from competing with the LLC in the LLC's business before the dissolution of the company.

805 ILCS 180/15-3(b).

The statute also provides that a member must discharge his or her duties to a member-managed company and its other members consistent with the obligation of good faith and fair dealing. 805 ILCS 180/15-3(d). However, in winding up of the LLC's business, a member's duty of care to a member-managed LLC and its other members is limited only to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law. 805 ILCS 180/15-3(c).

In a manager-managed company, a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member. 805 ILCS 180/15-3(g)(1). A manager, however, is held to the same standards of conduct prescribed for members

in § 15-3(b), (c), (d), and (e). 805 ILCS 180/15-3(g)(2). The statute also states that a member who, pursuant to the operating agreement, exercises some or all of the authority of a manager in the management and conduct of an LLC's business, is held to the standards of conduct in subsections (b), (c), (d), and (e), to the extent that the member exercises managerial authority. 805 ILCS 180/15-3(g)(3). Last, the Illinois LLC Act relieves a manager of liability imposed by law for violations of the standards described in § 15-3 to the extent that the managerial authority was delegated to the company's members by the operating agreement. 805 ILCS 180/15-3(g)(4).

In discharging their duties, the Illinois LLC Act expressly permits members and managers to consider the effect of any action (including a change in control) upon employees, suppliers, and customers of the LLC, as well as all other pertinent factors in considering the best long and short term interest of the company. 805 ILCS 180/15-15. Finally, the Illinois LLC Act expressly provides that a member of a member-managed LLC does not violate a duty or obligation under the statute or under the operating agreement merely because the member's conduct furthers his or her own interest. 805 ILCS 180/15-3(e).

Limited Liability of Members for Debts, Obligations, and Liabilities of the Company

A hallmark, and indeed the drawing consideration in establishing an LLC (coupled with pass-through tax treatment), is the limited liability of members and managers for the debts, obligations, and liabilities of the company. The state statute specifically states that “[a] member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.” 805 ILCS 180/10-10(a). This means that no member or manager, solely by virtue of is, her, or its being a member or manager of an LLC, is exposed to liability beyond any such member's required capital contributions to the LLC, even

when the assets of the entity are insufficient to satisfy a claim. And, importantly, unlike limited partners in a limited partnership governed by the former Revised Uniform Limited Partnership Act, this remains true despite the level of participation of a member in the affairs and management of the LLC. Cf. 805 ILCS 180/15-1, 10-10. (Even more importantly, however, the new Uniform Limited Partnership Act has removed that former limitation.)

However, several exceptions to the limited liability of members and managers of an LLC exist at common law and in statutory law. Perhaps the most well-known instance is the equitable doctrine of “piercing the corporate veil,” which unquestionably extends to LLCs as well as corporations. A court will decide to pierce the entity veil, holding members or managers personally liable, if (1) there is a unity of interest and ownership such that the separate personalities of the LLC and the individual member(s) or manager(s) no longer exist; and (2) the continued adherence to the fiction of a separate company existence would sanction a fraud or promote injustice. *See Jacobson v. Buffalo Rock Shooters Supply, Inc.*, 278 Ill.App.3d 1084, 1088, 664 N.E.2d 328, 331(1996). Generally, if a member commingles his or her personal funds or assets with those of the LLC or treats the LLC’s assets as his or her own, the court may find that there is a unity of interest and ownership between the LLC and the individual member.

In making the second determination—whether adherence to the separate entity existence would sanction fraud or injustice—the courts generally consider the following factors: (1) inadequate capitalization; (2) the failure to issue membership interests; (3) the non-payment of distributions; (4) the insolvency of the entity; (5) the non-functioning of the managers or officers; (6) the absence of company records; (7) commingling of personal and company funds; (8) diversion of assets from the LLC by or to a member; (9) failure to maintain arm’s length relationships among related entities; and (10) whether the LLC is a façade for the operation of

the dominant interest holder. *See id.* The Illinois LLC Act does, however, expressly provide (in contrast with the formal requirements for business corporations) that the failure of an LLC to observe usual company formalities or requirements relating to the exercise of its company powers or management of its business, is not itself a ground for imposing personal liability on the members or managers for the liabilities of the LLC. *Id.* § 180/10-10(c).

The Illinois LLC Act also specifies several other instances where members and/or managers of an LLC will be held personally liable:

- (1) By Agreement. Specified members are liable in their capacity as members for debts, obligations, or liabilities of the LLC if a provision to that effect is contained in the articles of organization *and* the member has consented in writing to the adoption of the provision or to be bound thereby. 805 ILCS 180/10-10(d);
- (2) Causing Unlawful Distributions. A member or manager is personally liable to the LLC for the amount by which a distribution by the LLC to its members exceeds the amount that could have been lawfully distributed if the member or manager votes for or assents to the unlawful distribution and the member or manager breached his or her fiduciary duties or duty of good faith and fair dealing. 805 ILCS 180/25-35(a);
- (3) Receiving Unlawful Distributions. A member is personally liable to the LLC for the amount by which a distribution received by the member exceeds the amount that could have been properly paid to the member if he knew that the distribution was unlawful. 805 ILCS 180/25-35(b);
- (4) Breach of Fiduciary or Other Duties. A member or manager is personally liable for breaching any of his or her fiduciary duties or duty of good faith and fair dealing owed to the company and its members. 805 ILCS 180/15-3; and
- (5) Inappropriate Acts During Dissolution. A member or manager with the knowledge of the LLC's dissolution that subjects a limited liability company to liability by an act that is not appropriate for winding up the company's business is liable to the company for any damage caused to the company arising from the liability. 805 ILCS 180/35-7(b).

Standing to Sue

An LLC, as an entity distinct from its owners, may sue and be sued in court. A member of the LLC may bring a derivative action on behalf of the company to enforce the LLC's rights where the member himself cannot allege an injury distinct from that of the LLC. To bring a derivative action on behalf of the LLC, the Illinois LLC Act requires that the member bringing the action show that (1) the members or managers with the authority to bring an action have refused to do so, or (2) an effort to cause those members or managers to bring the action is not likely to succeed. 805 ILCS 180/40-1. Additionally, the member bringing the action must show that he or she was a member at the time of the subject transaction or became a member through a person who was a member at the time. 805 ILCS 180/40-5. The Illinois LLC Act also provides that if a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability company the remainder of those proceeds received by the plaintiff. 805 ILCS 180/40-15.

A member of the LLC may also sue the LLC or another member to enforce the member's rights under the Illinois LLC Act, the operating agreement, and/or the member's rights arising independently of the member's relationship to the LLC. 805 ILCS 180/15-20(a).

Distributions

The default provisions of the Illinois LLC Act require that any interim distributions (distributions before dissolution and winding up of the LLC's business) made by the LLC to a

member, must be in equal shares. 805 ILCS 180/25-1(a). This default rule can lead to particularly inequitable and unintended results if the members' contributions to the LLC are disproportionately paid or otherwise made by certain members. The statute also provides that a member has no right to receive, nor can he, she, or it be required to accept, a distribution in kind. 805 ILCS 180/25-1(b).

Under the statute, an LLC is absolutely prohibited – regardless of any provision in its Articles or operating agreement – from making any interim distributions to its members if (1) the LLC would not be able to pay its debts as they become due; or (2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be terminated at the time of the distribution, to satisfy the members' preferential rights upon dissolution and winding up. 805 ILCS 180/25-30(a). As discussed above, a member or manager will be held personally liable to the LLC for the amount by which an unlawful distribution by the LLC to its members exceeds the amount that could have been lawfully distributed if the member or manager votes for or assents to the unlawful distribution and the member or manager breached his or her fiduciary duties or duty of good faith and fair dealing. 805 ILCS 180/25-35(a). Likewise, a member is personally liable to the LLC for the amount by which the distribution received by the member exceeds the amount that could have been properly paid to the member if he knew that the distribution was unlawful. 805 ILCS 180/25-35(b). However, the Illinois LLC Act, in addition to setting out detailed rules as to how to perform the calculation for "lawful" interim distributions, does provide that an LLC may base its determination that a distribution is not prohibited under subsection (a) of § 25-30 on financial statements prepared on the basis of accounting practices and principles or another method that is reasonable under the circumstances. 805 ILCS 180/25-10(b).

Upon dissolution and winding up of the LLC, the default provisions of the Illinois LLC Act supply a hierarchy of individuals to receive the company's final distributions: First, the LLC's assets are applied to discharge obligations to creditors, including members who are creditors; second, the LLC's assets are applied to return all members' contributions that have not previously been returned; and third, the assets are distributed to its members in equal shares. Like interim distributions, the default rule for an LLC's final distributions will be distributions to its members in equal shares. Here, again, it is important to note that if the members of the LLC have disproportionate interests in the company, careful drafting of the LLC's operating agreement is necessary to ensure distributions, both interim and, upon dissolution, final, are in accordance with the intentions of the company's members.

Dissociation (Withdrawal) of a Member

Events Causing Dissociation

Dissociation refers to the voluntary or involuntary withdrawal of a member from an LLC. Dissociation gives rise to several different rights and obligations under the statute. The Illinois LLC Act specifies that the occurrence of any of the following events will cause a member's dissociation from an LLC:

1. The company's having notice of the member's express will to withdraw upon the date of notice or on a later date specified by the member.
2. An event agreed to in the operating agreement as causing the member's dissociation.
3. Upon transfer of all of a member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest that has not been foreclosed.
4. The member's expulsion pursuant to the operating agreement.
5. The member's expulsion by unanimous vote of the other members if:
 - (A) it is unlawful to carry on the company's business with the member;
 - (B) there has been a transfer of substantially all of the member's distributional interest, other than a transfer for security purposes or a court order charging the member's distributional interest that has not been foreclosed;

- (C) within 90 days after the company notifies a corporate member that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, the member fails to obtain a revocation of the certificate of dissolution or a reinstatement of its charter or its right to conduct business; or
 - (D) a partnership or a limited liability company that is a member has been dissolved and its business is being wound up.
6. On application by the company or another member, the member's expulsion by judicial determination because the member:
 - (A) engaged in wrongful conduct that adversely and materially affected the company's business;
 - (B) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members under Section 15-3; or
 - (C) engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the business with the member.
 7. The member's:
 - (A) becoming a debtor in bankruptcy;
 - (B) executing an assignment for the benefit of creditors;
 - (C) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property; or
 - (D) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the member or of all or substantially all of the member's property obtained without the member's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated.
 8. In the case of a member who is an individual:
 - (A) the member's death;
 - (B) the appointment of a guardian or general conservator for the member; or
 - (C) a judicial determination that the member has otherwise become incapable of performing the member's duties under the operating agreement.
 9. In the case of a member that is a trust or is acting as a member by virtue of being a trustee of a trust, distribution of the trust's entire rights to receive distributions from the company, but not merely by reason of the substitution of a successor trustee.
 10. In the case of a member that is an estate or is acting as a member by virtue of being a personal representative of an estate, distribution of the estate's entire rights to receive distributions from the company, but not merely the substitution of a successor personal representative.
 11. Termination of the existence of a member if the member is not an individual, estate, or trust other than a business trust.

805 ILCS 180/35-45.

The statute goes on to state that a member of a member-managed company has the power to dissociate from an LLC at any time, rightfully or wrongfully, by giving notice under subdivision (1) of § 35-45. 805 ILCS 180/35-50(a). However, a member of a manager-managed LLC does not have the power to voluntarily dissociate from the company before the dissolution and winding up of the company if an operating agreement does not specify, in writing, the time or the events upon the happening of which a member of a manager-managed company may dissociate. 805 ILCS 180/35-50(a).

Whether a member's dissociation is rightful or wrongful is important in determining liability of a dissociated member to the LLC and whether purchase of a member's distributional interest must be offset by damages caused by his or her wrongful withdrawal.⁶ The Illinois LLC Act provides that a member who wrongfully dissociates from a member-managed company is liable to the company and to the other members for damages caused by the dissociation (the liability is in addition to any other obligation of the member to the company or to the other members). 805 ILCS 180/35-50(c). However, a member's dissociation from a member-managed company is wrongful in the first place only if it is in breach of an express provision of the company's operating agreement. 805 ILCS 180/35-50(b).

If a member-managed LLC does not dissolve and wind up its business as a result of a member's wrongful dissociation, damages sustained by the company for the wrongful dissociation must be offset against distributions otherwise due the member after the dissociation. 805 ILCS 180/35-50(d).

⁶ 805 ILCS 180/35-50(e) provides that unless otherwise provided in writing in an agreement, a company whose original articles of organization were filed with the Secretary of State and effective on or before January 1, 2001, shall continue to be governed by this Section as in effect immediately prior to January 1, 2001, and shall not be governed by this Section [35-50], as it presently exists.

Effect of Member's Dissociation

Upon a member's dissociation from a limited liability company, the member's right to participate in the management and conduct of the company's business terminates and the member ceases to be a member and is treated the same as a transferee of a member, except that a member that has not wrongfully dissociated may participate in the winding up of the business. 805 ILCS 180/35-55(b)(1). Upon dissociation, a member's fiduciary duties also terminate, except that the member's duty of loyalty to account to the company, act fairly when dealing with the company in winding up its business, and duty of care under subsection (c) of § 15-3 continue only with regard to matters arising and events occurring *before* the member's dissociation (unless the member participates in winding up the company's business pursuant to § 35-4). 805 ILCS 180/35-55(b)(2), (3).

Upon a member's dissociation from the LLC, unless otherwise provided in the operating agreement, the company must purchase the dissociated member's distributional interest if the dissociation does not result in the dissolution and winding up of the company. 805 ILCS 180/35-55(a). The purchase price for the distributional interest of a dissociated member is the "fair value" (as opposed to "fair-market value") of his, her, or its distributional interest on the date of the dissociation. 805 ILCS 180/35-60(a). The terms and price of a purchase of a dissociated member's interest may be fixed by the operating agreement, but if the LLC defaults in providing the correct distribution, the Illinois LLC Act empowers the dissociated member to commence a judicially supervised dissolution and winding up of the company. 805 ILCS 180/35-60(c). The statute also specifies several strict timing requirements in determining and extending a purchase agreement to a dissociated member, violation of which may allow the dissociated member to commence a proceeding to have his or her distributional interest determined by a court. *See* 805

ILCS 180/35-60(d). Again, any damages for wrongful dissociation under § 35-50, and all other amounts owing from the dissociated member to LLC, must be offset against the purchase price. 805 ILCS 35/60(f).

Dissolution of an LLC

A limited liability company is dissolved, and its business must be wound up, upon the occurrence of (1) an event specified in the operating agreement; (2) consent of the number or percentage of members specified in the operating agreement to cause dissolution; or (3) the happening of an event that makes it unlawful for all or substantially all of the business of the company to be continued, (but any cure of illegality within 90 days after notice to the company of the event is effective retroactively to the date of the event). 805 ILCS 180/35-1(1)-(3). The Illinois LLC Act allows dissolution of an LLC under one of these three provisions to be avoided if before the winding up of the business is complete, the members (and any dissociated member that caused the dissolution) unanimously waive the requirement that the company dissolve and terminate. 805 ILCS 180/35-3(b).

Dissociation by a member from an LLC itself does not necessarily dissolve an LLC. However, on application by a member or a dissociated member, a court may order an LLC to dissolve if it determines that (1) the economic purpose of the company is likely to be unreasonably frustrated; (2) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the LLC's business with that member; (3) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; (4) the company failed to purchase the petitioner's distributional interest as required; or (5) the managers or members in

control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioner. 805 ILCS 180/35-1(4). Additionally, on application by a transferee of a member's interest, a court may order an LLC to dissolve if it determines that it is "equitable" to wind up the company's business. 805 ILCS 180/35-1(5).

Last, the Illinois Secretary of State may administratively dissolve an LLC for (1) its failure to file an annual report or any other report within 180 days of its due date or (2) the LLC fails to appoint an Illinois registered agent within 60 days of its former agent's resignation. 805 ILCS 180/35-25(a). Procedurally, the Secretary of State must send a delinquency notice to the LLC allowing 120 days to correct the default before the State will dissolve the LLC. 805 ILCS 180/35-25(b). After administrative dissolution, an LLC may be reinstated only by filing an application for reinstatement and filing all reports that are delinquent and paying all fees and any outstanding penalties that are due. 805 ILCS 180/35-40.

Series LLCs

Effective August 16, 2005, the Illinois LLC Act was amended to provide for the creation of "Series" LLCs. In effect, in a Series LLC, a limited liability company can create sub-entities within an existing LLC to isolate the liabilities arising from a group of assets or activities from the other assets or activities of the LLC. Each "cell" LLC has separate members, managers, assets, liabilities, and business interests. In theory, this is similar to the formation of a "parent" LLC holding company to hold its assets and operate its various lines of business through multiple single member LLCs. Thus, all debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series are enforceable against that series only, and not against the assets of the LLC generally or any other series of the LLC.

Traditionally, this same effect could be accomplished by simply creating a separate LLC. However, a Series LLC does not incur separate governmental fees for each sub-entity, thus permitting some modest savings in such costs. To receive asset protection of one sub-entity vis á vis another, an LLC must treat each series separately. Independent books and records must be kept for each series, and the assets of each series must be separately held and accounted for. The most obvious use for the Series LLC is to hold multiple parcels of real property in liability-segregated cells.

It should be noted that, because the Series LLC is a new entity, there is no case law analyzing their intricacies. Additionally, only a few states currently allow Series LLCs, and hence the special liability-limitation provisions of a Series LLC may be challenged or even disregarded in jurisdictions that do not recognize such an entity.

Foreign LLCs, Conversions, and Combinations

As previously noted, the Illinois statute expressly allows for the limited liability in Illinois of foreign limited liability companies by providing that these “may not be denied admission by reason of any difference[s]” between Illinois’ LLC law and the laws of the other jurisdictions in which those entities are domiciled, and by further providing that as to those companies’ “organization and internal affairs and the liability of [their] managers, members, and...transferees” are governed by the law of the respective foreign jurisdiction. Section 45-1.

Illinois also permits the direct “conversion” of partnerships or limited partnerships into limited liability companies, without change in the entity. Sections 37-10, 15.

Finally, Illinois expressly permits mergers of LLCs “with or into one or more limited liability companies, foreign limited liability companies, corporations, foreign corporations,

partnerships, foreign partnerships, limited partnerships, foreign limited partnerships, or other domestic or foreign entities” if permitted under the law governing the (other) domestic or foreign entity. Section 37-20.

C. OVERVIEW OF OTHER POTENTIAL BUSINESS ENTITIES

1. General Partnerships and Limited Liability Partnerships

General partnerships are separate legal entities that consist of “an association of two or more persons to carry on as co-owners a business for profit formed under [the Uniform Partnership Act (1997)], predecessor laws, or comparable laws of another jurisdiction.” 805 ILCS 206/101 (f). They are the easiest to form of all the separate legal entities because they can arise simply from the fact of such an association, based on a partnership agreement, for such co-ownership of a business for profit. That Agreement may be “written, oral, or implied” (805 ILCS 206/101(g)) and will suffice to create a partnership “whether or not the persons intend to form a partnership” (805 ILCS 206/202(a)). Even if the partnership agreement only covers that single basic point, a valid general partnership is thereby established: the statute will supply all the other terms through its comprehensive “default” provisions, i.e., provisions that automatically operate in the absence of a partnership agreement to the contrary.

Although general partnerships are separate legal entities “distinct from their partners” (805 ILCS 206/201(a)), they have the potential to create personal liabilities for each of the partners going far beyond even the unlimited personal liabilities of sole proprietors. For, according to Section 301 of the statute:

“Each partner is an agent of the partnership for purposes of its business. An act of a partner... binds the partnership, unless the partner had no authority to act for the partnership in the particular

matter and the person with whom the partner was dealing knew or had received notification that the partner lacked authority.”

(805 ILCS 206/301 (1))

According to Section 305:

“A partnership is liable for loss or injury... to [any] person...as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.”

(805 ILCS 206/305 (a))

And, according to Section 306:

“Except as otherwise provided in subsections (b) and (c) of this Section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”

(805 ILCS 206/306 (a)) (emphasis supplied)

Subsection (b) of the latter Section of the Act merely excuses a partner from personal liability with respect to partnership obligations incurred before that person became a partner.

Subsection (c) states the important exception for general partnerships that elect to become limited liability partnerships, discussed below.

General partners’ personal assets as well as their partnership business assets are thus at risk without limit for any debts incurred or “wrongful acts” performed by any of their other partners while engaged in the partnership’s business. What is more, every general partner possesses the unwaivable power to dissociate from the partnership at any time by express will (805 ILCS 206/103 (b)(5); 805 ILCS 206/602 (a)). Absent a specific partnership agreement to the contrary, such a voluntary withdrawal automatically dissolves the partnership in the case of any “partnership at will” (which is any partnership except one for a definite term or particular undertaking) and requires the winding up of its business under Article 8 of the Act.

Also, again in the absence of a specific partnership agreement to the contrary, every dissociation of a partner that does not lead to a partnership dissolution, whether through voluntary withdrawal or a host of other adverse personal circumstances such as death, disability, or bankruptcy as set forth in Section 601, automatically requires the partnership to purchase the dissociated partner's interest for cash at a price equal to the greater of the liquidation value or the going concern value of the business without the dissociated partner. 805 ILCS 206/701. (Provable damages, if any, for "wrongful" dissociation may, however, be offset against this compulsory buyout price.) Thus, a continuing general partner's interest in the partnership may be at risk not only because of what another partner does in the conduct of the partnership business, but also because of personal misfortunes that befall another partner. The larger the dissociated partner's relative interest, the greater the likelihood that the required cash buyout will jeopardize the finances and prospects of the partnership, and hence reduce the worth of all the remaining partners' respective interests in it.

Some of these asset-protection risks of a general partnership can be reduced by the use of other entities -- in particular, limited liability entities -- as the general partners. (There is no requirement that partners must be natural persons.) Some of the risks can also, as has been seen, be reduced by specific contrary provisions of a partnership agreement. However, there are so many potentially problematical default provisions in the Uniform Partnership Act that the above-mentioned ease of forming a general partnership may properly be regarded as a trap for the unwary. Among the other default provisions of that statute (as well as the Limited Liability Company Act, it should be emphasized) that require revisions in most cases are the equal sharing of all profits among all partners and of all decision making authority by a majority of all partners, regardless of their relative contributions to the firm. In sum, a general partnership may

sometimes prove to be extremely successful and profitable for its partners, and in a case where all the partners are contributing services provides the flexibility of compensating them for those services by draws against partnership profits as opposed to guaranteed payments under I.R.C. Section 707(c). But as a means of doing business with co-owners it is incontestably the worst of all in terms of asset protection.

As of August 11, 1994, Illinois began allowing existing general partnerships to elect to become limited liability partnerships by registering as such with the Secretary of State. At first, the asset protection of this election was extremely limited because it merely shielded a partner from various forms of vicarious professional malpractice liability for the actions of other partners and employees of the partnership. However, since the enactment of the Uniform Partnership Act (1997), there has been much broader liability protection:

“An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.”

(805 ILCS 206/306(c))

The partners of Illinois general partnerships formed after 2003 that elect limited liability partnership status automatically receive this greatly enhanced asset protection, subject to the applicable licensing rules for regulated professions. The partners of Illinois general partnerships formed before 2003 must, however, prior to 2008 (when all general partnerships must be brought under the new Act), first amend their partnerships to subject them to the new Act and then

register them as limited liability partnerships in order to receive this same sweeping new form of asset protection.⁷

Illinois attorneys -- to take merely one example of a regulated profession -- have been permitted to practice in limited liability partnerships since July 1, 2003, pursuant to amended Illinois Supreme Court Rule 721 and the newly added Rule 722. Their limited liability partnerships must however, maintain at least minimally adequate professional liability insurance or else other proof of financial responsibility, in the amount of at least \$100,000 per claim and \$250,000 in the aggregate multiplied by the number of attorneys. Supreme Court Rule 722(b)(1). Also, they themselves must remain personally liable for any professional malpractice of theirs or of any other persons under their own direct supervision and control. Supreme Court Rule 722(c).

The initial registration of a partnership as a limited liability partnership is effective for a period of one year after the later of the filing date of the initial Statement of Qualification with the Secretary of State or the effective date specified in that statement and the payment of the required filing fee. That status remains effective during that period regardless of changes in the partnership unless the partnership voluntarily withdraws its registration. 805 ILCS 206/1001 (e).

⁷ For the sake of brevity, the present discussion will not deal with the differences between the previous Uniform Partnership Act and the current version, i.e., the Uniform Partnership Act (1997). Nor will it deal with the differences between the previous limited partnership statute (the Revised Uniform Limited Partnership Act) and the current one (the Uniform Limited Partnership Act). However, in both cases the previous statutes may continue to apply to partnerships that were formed prior to the respective applicable mandatory effective dates and do not elect to be governed by the respective new statutes, until the end of next year.

Thereafter, annual renewal statements with the required fee must be filed in order to maintain the limited liability partnership's status.

Although limited liability partnerships are certainly a great improvement in terms of asset protection over general partnerships that have not so registered, they share with general partnerships at least the following important asset protection risk. All the partners' business assets -- all their investments in their present and future benefits from the firm -- remain fully subject to any liabilities created by the other partners or the firm's employees in the conduct of the firm's business. Every partner is an agent of the entire firm with apparent authority (under the Uniform Partnership Act's default rules) to act for the entire firm. Moreover, again under the Act's default rules, partners who voluntarily withdraw from the partnership can thereby cause a dissolution of the partnership. And, even if their "dissociation," whether voluntary or not, does not lead to a dissolution, it can impose a potentially very burdensome immediate cash buyout obligation upon the firm in the amount of the greater of the dissociating partners' shares of the liquidation value or of the going concern value of the firm.

General partners also owe strict fiduciary duties toward their other partners and the firm, which various potential outside investors in the business might find to be intolerable. The default rules requiring equal sharing of all profits and control according to the number of partners, not the amount of their contributions, except as specifically modified by the partnership agreement, are also an obvious impediment to outside investment. Without outside investment, the general partners are necessarily required to put and leave more of their own capital at risk in the partnership than they would if the partnership could attract such investors.

For these reasons, from an asset protection standpoint, even limited liability partnerships, with their express statutory protection from personal liability, are inferior to limited partnerships

and limited liability limited partnerships. Only if the partners affirmatively desire to spread substantial decision making authority among the partners, to preserve substantial fiduciary duties among the partners, and to run the partnership without substantial outside equity investment, would they be inclined to prefer a limited liability partnership, not even to speak of a general partnership, over a limited partnership or limited liability limited partnership.

2. Limited Partnerships and Limited Liability Limited Partnerships

The two formerly significant asset-protection disadvantages of limited partnerships, as compared with limited liability companies, have recently been eliminated. First, under the Uniform Limited Partnership Act (2001), which became effective on January 1, 2005, and will entirely replace the former Revised Uniform Limited Partnership Act as to preexisting limited partnerships as of January 1, 2008, limited partners are no longer in danger of losing their express statutory protection from personal liability if they participate in the management and control of the limited partnership. 805 ILCS 215/303. Second, it is now possible under the same statute for the general partners of limited partnerships to receive the same statutory protection from personal liability as do the limited partners and the general partners of registered limited liability partnerships, merely by causing those limited partnerships to file a statement in their respective Certificates of Limited Partnership that they elect to become “limited liability limited partnerships.” 805 ILCS 215/201 (a)(4); 805 ILCS 215/404(c).

It remains desirable for asset protection purposes for the general partners of all limited partnerships and limited liability limited partnerships to be limited liability entities. This is essential to avoid possible personal liability in the case of a general partner of a limited partnership, and it provides important back-up asset protection in the case of general partners of

limited liability limited partnerships. The use of a limited liability entity general partner -- or even better, two of them -- also reduces the chance that a limited partnership or limited liability limited partnership might be dissolved because of the dissociation of a general partner. 805 ILCS 215/801. A corporate general partner, for example, would never die or become disabled, and if there were two, even the withdrawal of one of them would not (even as a default rule) cause the dissolution of the partnership unless within 90 days after the dissociation of one the general partners a majority in interest of the remaining partners affirmatively consented to the partnership's dissolution. Id.

By centralizing the control of and apparent authority to act for a partnership in only one or two general partners, by separating the owners' investment returns from any required contribution of services by them, and by facilitating the transfer of their economic interests, limited partnerships and limited liability limited partnerships obviously lend themselves to the involvement of outside equity investors. They thus reduce the individual contributions of capital that the general partners and each of the other co-owners of the enterprise must place at risk in order for it to succeed. For their limited partners, they now offer the same high degree of asset protection long enjoyed by passive investors in corporate stock.

Like corporations, limited partnerships and limited liability limited partnerships also avoid a little-noticed asset protection risk of limited liability companies and series limited liability companies. This is the "default rule" for both of the latter that:

"A limited liability company shall purchase [for cash] the distributional interest of [any] member for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under Section 35-1."

(805 ILCS 180/35-60)

By contrast, according to the Uniform Limited Partnership Act (1997):

“A person does not have a right to receive [any] distribution on account of dissociation.”

(805 ILCS 215/505)

All partners' investments are thus locked into a limited partnership or limited liability limited partnership until its termination except to the extent that the partnership agreement specifically lets them out. Limited liability companies' members, on the other hand, may require those companies (on pain of dissolution for nonperformance) to buy them all out for cash upon dissociation except to the extent that the operating agreement specifically precludes that right. This marked difference in the respective default rules, it is submitted, makes limited liability limited partnerships, and especially those with multiple corporate general partners, more completely protective of all their owners' assets than are limited liability companies. The greater current popularity of LLCs over limited liability limited partnerships as asset protection devices for businesses with multiple owners is at least in part the result of widespread misunderstanding.

3. C Corporations

Ordinary business corporations have historically been the principal form of limited liability entities, and their chief legal characteristics -- shareholders, directors, officers, and various required approvals of corporate actions by meetings or written consents -- are so familiar as not to call for any detailed discussion here. From an asset protection perspective, business corporations (including “close corporations” and S corporations, which are merely business corporations that meet certain additional requirements) remain a highly satisfactory long-proven legal device. Expecting the shareholders periodically to elect directors, the directors to direct, and the appointed corporate officers whom they direct to act as the agents of the corporation, not

as principals, is not, after all, onerous. Also, although directors and officers of a corporation must be individuals and do not benefit from the same express statutory protection against personal liability that managers of LLCs and general partners of limited liability partnerships and limited liability limited partnerships do, they have long been protected against personal liability by basic doctrines of the common law.

Through shareholder agreements, closely held business corporations can also be made to operate in much the same manner as LLCs or other limited liability entities. The shareholders may agree, for example, to install and maintain particular individuals as directors, knowing that they will, in turn, appoint certain other persons (or themselves) as the officers and otherwise conduct the business of the company in a desired manner. The shareholders may also agree, for another example, to restrict the ordinary free transferability of their shares or to require their purchase in certain circumstances as in “buy-sell agreements.” They can thus create, if they wish, an almost partner-like relationship with one another, without the corresponding personal liability or fiduciary obligations of a partnership.

C corporations now frequently create subsidiary entities in the form of single- member LLCs. A single-member LLC is treated as a separate entity for state law purposes, with the same liability protection as a corporation. However, for federal income tax purposes it is treated as a disregarded entity and treated as a division of the parent corporation, rather than a separate entity. For many businesses, the filing of this type of a tax return is simpler and more desirable compared with compliance with the rules for consolidated corporations.

Similarities between LLCs and C Corporations are that both are separate legal entities that are created by a state filing. Also, both offer the same limited liability protection and the owners are typically not personally responsible for the debts and liabilities of the business. Both

entities have very few ownership restrictions. The owners are not required to be individuals as with an S Corporation. The ownership (capital stock with a C corporation or membership interest with an LLC) can be divided into numerous classes. C corporations pay income taxes on taxable income, so the shareholder/owners may be subjected to double taxation: once at the corporate level and again when corporate earnings are distributed as dividends. Rather than pay additional taxes on dividends, the owners of closely held corporations often pay themselves additional compensation that reduces the corporation's taxable income.

4. S Corporations

S corporations are simply business corporations with a certain limited number of shareholders of certain kinds and with only one class of stock that make an election subsequent to their formation to be treated as S corporations for federal income tax purposes. Typically, they, too, have shareholder agreements designed to maintain that tax status.

Similarities between LLCs and S corporations are that both are separate legal entities that are created by a state filing and they offer the same limited liability protection, namely, that the owners are typically not personally responsible for the debts and liabilities of the business. Also, both are pass-through tax entities – this means that the income or loss generated by the business is reflected on the personal income tax return of the owners.

Differences between LLCs and S Corporations are, among other things, that the ownership of an S Corporation is restricted whereas the ownership of a limited liability company is in no way restricted. The following are some of the restrictions concerned:

- a. An LLC may have an unlimited number of members (owners), while an S corporation is restricted to no more than 100 shareholders.

- b. Non-U.S. residents may be members of an LLC, while an S corporation may not have non-U.S. residents as shareholders.
- c. S corporations may not be owned by C corporations, other S Corporations, many trusts, LLCs, or partnerships. Limited liability companies, on the other hand, are not subject to these restrictions.

Although much has been made of the provision of the Illinois LLC Act that excuses compliance with certain “corporate” formalities, it is simply a myth that corporations must constantly observe every punctilio of proper corporate form in order to protect their shareholders, directors, and officers from personal liability. Indeed, the provision in the Limited Liability Company Act that personal liability may not be imposed on any member or manager “solely” because of departures from ordinary company formalities is reassuring but also misleading if not properly understood. Corporate directors and officers must for their own legal protection always make clear that their actions are taken only as agents of the corporation, and there is thus for them some risk in ignoring corporate formalities (which they therefore do not), but corporate shareholders as such do not take any official corporate action for the corporation. They are not agents in the first place, have no apparent authority, and assume no management or fiduciary responsibility or risk.

To reiterate, business corporations of all kinds confer a great deal of asset protection upon their owners, just as the state legislature has long intended and the courts have long recognized. The asset-protection similarities between business corporations and the other forms of limited liability entities greatly exceed the differences. Their principal drawback relative to other kinds of limited liability entities, apart from the cumbersome appraisal and buyout rights of dissenting shareholders in connection with various corporate transactions, has nothing to do with asset protection.

The principal reason for the sharply increasing use of LLCs instead of business corporations since they were first authorized in Illinois (in 1994) and especially since the Internal Revenue Service issued its “check-the-box” regulations concerning elective entity tax status (in 1996), is, of course, their federal income tax benefits, not any significant increase in asset protection for their business owners.

When Illinois’ Limited Liability Company Act (805 ILCS 180/1 et seq.) became effective on January 1, 1994, from an asset-protection standpoint alone, apart from tax considerations, LLCs provided even greater benefits than limited partnerships, not to speak of general partnerships. For, as has been seen, limited partners then could lose their liability protection if they participated to any extent in the management of the limited partnership, and general partners then were fully personally liable for all limited partnership obligations.

All members and even the managers of limited liability companies also had the important asset protection advantages over the directors and officers of business corporations that they were expressly protected by the statute against personal liability (beyond the extent of their investment in the respective LLCs) if they acted solely as such members or managers, and that they could themselves be limited liability entities. Directors and officers of business corporations, by contrast, could only look to the common law for protection, and were required to be individuals. In addition, the LLC statute liberalized the internal operating procedures necessary to protect against the loss of limited liability by providing that:

“The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.”

(805 ILCS 180/10-10(c))

Limited liability partnerships and, since 2005, limited liability limited partnerships have since obtained the statutory right to all these same protections except the last. It is arguable that the last protection itself can create a trap for the unwary by encouraging such supposed “informalities” -- actually, major substantive defects -- as the undercapitalization of the entity and the commingling of entity and personal assets. Nevertheless, by permitting the members and managers of an LLC, even a manager-managed LLC, to work together in carrying on the LLC’s business without fear of personal liability, the LLC as an asset-protection device was at one point years ahead of the others’ time.

Even now, LLCs have this one remaining theoretical asset-protection advantage over limited liability limited partnerships: they are not subject to possible dissolution upon the dissociation of a manager to quite the same extent (albeit very slight) as are limited partnerships and limited liability limited partnerships upon the dissociation of a general partner. Although well-drawn limited (or general) partnership agreements can virtually eliminate this problem, especially if the general partners are themselves limited liability entities and there is at least one remaining general partner, LLCs may still be considered slightly more asset-protective than limited partnerships in this one particular regard.

On the other hand, it would seem to be far more important that every LLC is subject to the risk of its assets being stripped away to purchase for cash the distributional interests of any of its members who dissociate. As the statute provides:

“A limited liability company shall purchase a distributional interest of a member for its fair value determined as of the date of the member’s dissociation if the member’s dissociation does not result in a dissolution and winding up of the company’s business under Section 35-1.”

(805 ILCS 180/35-60(a))

The statute further provides that a limited liability company “is dissolved” and, unless continued by the unanimous consent of all members as well as all dissociated members whose dissociation caused the dissolution, its business “must be wound up,” on application by a member or dissociated member, upon the entry of a judicial decree that:

“(A) the economic purpose of the company is likely to be unreasonably frustrated;

“(B) another member has engaged in conduct relating to the company’s business that makes it not reasonably practicable to carry on the company’s business with that member;

“(C) it is not otherwise reasonably practicable to carry on the company’s business in conformity with the articles of organization and operating agreement;

“(D) the company failed to purchase the petitioner’s distributional interest as required by Section 35-60; or

“(E) the managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioner.”

(805 ILCS 180/35-1(4))

Perhaps even more importantly, the company must likewise be dissolved and its business wound up on application of any transferee of a member’s interest, such as any creditor that has foreclosed upon such interest, and a resulting judicial determination that it is “equitable to wind up the company’s business” (805 ILCS 180/35-1(5)).

In other words, LLCs are subject to a host of default-rule buyout obligations and even dissolution obligations that limited partnerships and limited liability limited partnerships are not. (Compare the complete absence of buyout obligation and the extremely limited possibility of any

nonconsensual dissolution under Sections 505 and 801 of the Uniform Limited Partnership Act (1997)). This is a serious potential flaw in the asset protection that they provide.

While this flaw can be partially addressed by specific provisions of an LLC operating agreement modifying these default rules, most standard operating agreements that have been reviewed by this author do not deal sufficiently specifically with all these points. This problem is inherent in the markedly different default rules of the respective statutes: those for limited partnerships and limited liability limited partnerships accomplish an excellent asset-protective result -- for example, no distributions to any dissociating partner except upon dissolution -- unless changed, whereas those for LLCs lead to the opposite result, at least in regard to buyouts upon dissociation and nonconsensual dissolution.

All of LLCs' profits and management control, like those of general partnerships, must also be shared equally among all members except as otherwise specified by their operating agreements.

These problems, among others, may have originated in the initial model of most LLCs as member-managed -- as, so to speak, limited liability partnerships before their time. Certainly, the statutory default rules for member-managed LLCs pose buyout and dissolution problems similar to those of a general partnership or limited liability partnership, whereas those for manager-managed LLCs, on the whole, at present, do not. But whatever the possible original legislative reasons for the radically different default rules, they exist and can create many unintended harmful consequences. As a result, the conclusion seems inescapable that limited partnerships and especially limited liability partnerships have now become more asset-protective than LLCs in a number of important regards.

Of course, a partnership requires more than one owner, whereas an LLC does not. For asset-protection purposes alone, not to speak of relative tax benefits, a single-member LLC would always be preferable to a sole-shareholder business corporation. Its member/manager is expressly protected by statute from personal liability for company obligations and may be a limited liability entity. The member/manager's departures from the usual corporate formalities are likewise expressly statutorily allowed.⁸

5. Other Entities: Designated Series of Series LLCs

LLCs currently offer one other unique asset-protection benefit although it is likely that it, too, will soon be extended to other forms of limited liability entities: the ability to insulate particular assets and associated liabilities of the entity from all its others by the use of separate internal "series." Such Series LLCs are next discussed.

As of August 16, 2005, Series LLCs have been allowed to be established in Illinois. The necessary public notification of the establishment of an Illinois LLC as a Series LLC is contained in the following preprinted language on the special required Series LLC form of the Articles of Organization:

"The operating agreement provides for the establishment of one or more series. When the company has filed a Certificate of Designation for each series, which is to have limited liability pursuant to Section 37-40 of the Illinois Limited Liability Company Act, the debts, liabilities, and obligations incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the Limited Liability Company generally or any other series thereof, and unless otherwise

⁸ On the other hand, the sole shareholder of a business corporation could install whichever individual directors or officers that shareholder wanted just as the sole member of a single-member LLC could install whichever manager that member wanted; there is no functional difference in a sole owner's power over each of the two respective entities except that the directors and officers of a business corporation may only be individuals.

provided in the operating agreement, none of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to this company generally or any other series thereof shall be enforceable against the assets of such series.”

In turn, Section 37-40 of the statute provides, among other things, that if separately designated series of members, managers, or ownership interests having separate rights, powers, or duties with respect to separate properties or businesses belonging to those series are created by the operating agreement; if “separate and distinct” records and accounts are kept for each such series; if separate “designations” for each series are filed with the Secretary of State; and if the operating agreement provides that each series is to be treated (in accordance with the above-mentioned public notification) as in effect a separate legal entity, then each series will have the last-mentioned inherent liability-limiting characteristic. Thus, the liabilities associated with one series will not spill over to affect any other series or, indeed, all the rest of the Limited Liability Company, and vice-versa.

This is a powerful tool for reminding Series LLC owners of the importance of isolating various possibly liability-creating properties or businesses in separate “cells” so as to protect the overall value of all those ownership interests from destruction by liabilities or losses associated with only a few of them. It is at present only available for LLCs, although the statutory extension of its permitted use to other forms of limited liability entities may be anticipated.

With that said, it must also be noted that exactly the same “spillover” liability-limiting effect can be accomplished more surely by setting up entirely separate entities -- multiple different LLCs or limited liability limited partnerships, for example. Also, the very existence of those completely separate entities (the ultimate default rule) would tend to force their respective owners and agents to operate them separately, whereas such an approach would instead always

have to be carefully adhered to in a Series LLC. In the end, therefore, Series LLCs' special attraction may amount to only a modest saving in total filing fees at the Secretary of State's Office.⁹

The relative significance of saving a few hundred dollars per series in initial filing fees, will, of course, depend on the financial circumstances of the particular Series LLC owners. For some, it might prove very attractive, for example, the owners of large, heavily debt-financed portfolios of small investment real estate properties such as rented single-family homes. Other varieties of small businesses might also benefit from Series LLC status -- if all the series' accounts are scrupulously maintained separately as required.

Overall

As observed above, limited liability companies provide somewhat less asset protection to their owners than do limited partnerships and limited liability partnerships. They likewise provide less protection to their owners than do business corporations (though not the individual directors and officers thereof). But the overall practical differences in the relative amounts of asset protection provided by these entities are slight. Thus, to repeat, the primary reason for the rapid growth in the use of LLCs since 1994 and especially since 1996 (when the I.R.S. issued its "check-the-box" regulations: see Reg. § 301.7701.3), has unquestionably been their federal income tax benefits.

⁹ Series LLCs do offer the intriguing additional possibility of alternately characterizing some or all of the separate series as separate taxpayers or the same taxpayer for federal income tax purposes, which might produce aggregate income tax savings in certain situations. However, given the inherent practical difficulties of operating a Series LLC with sufficient differences in the ownership and control of the different series to warrant separate-taxpayer treatment in one year but not the next or the one before, this possibility would seem to be largely theoretical.

Apart from single-member LLCs, which are in almost all cases entirely disregarded for income tax purposes, leading to their frequent use as part of an overall organization of related limited liability entities, almost all LLCs elect to be taxed as partnerships under Subchapter K of the Internal Revenue Code. Thus, they have, in common with all other partnerships, the tax benefits of being a pass-through entity. Only the partners themselves are taxed (I.R.C. § 701), and only on their respective allocated shares of the partnership's income, deductions, and other tax attributes (I.R.C. § 702). Those shares, too, may be specially allocated to the tax advantage of particular partners so long as those allocations possess economic substance (I.R.C. § 704).

Partners' contributions of appreciated property to the partnership are, except in rare instances, tax-free regardless of whether those partners are part of a control group owning 80 percent or more of the equity (I.R.C. § 721).

Partners' tax bases may include their respective shares of partnership liabilities, thus creating the possibility of substantial passed-through deductions for the partners, subject to the "at risk" and "passive loss" limitations.

Partnership distributions, of all kinds, even in liquidation, are also in general tax-free (I.R.C. § 731).

All these favorable income tax features of partnerships are in contrast to the corresponding unfavorable income tax features of C corporations, i.e., corporations taxed according to Subchapter C of the Code, which are so well known as not to require discussion here.

True, C corporations and S corporations may engage in tax-free reorganizations under Section 368 of the Code, whereas partnerships may not. This is one of the few relative benefits of corporate as opposed to partnership income taxation. However, because of the very liberal

rules regarding tax-free distributions by partnerships, this factor is not usually of any significance. (Partnerships may carry out nontaxable partnership-to-partnership conversions, anyway, pursuant to Section 721). Even where it might be of some significance, an LLC has the right to elect corporate status for income tax purposes under the aforementioned check-the-box regulations.

The only form of ordinary business corporation that provides income tax benefits at all comparable to those of LLCs and partnerships is the S corporation. Assuming that it has not been converted from a C corporation with earnings and profits or “built-in gains,” an S corporation provides essentially the same tax-free pass-through of income and deductions as a partnership. However, an S corporation shareholder’s basis is not increased by that shareholder’s proportionate share of any company liabilities unless the shareholder is personally at risk as to them. An S corporation may not make the Section 754 election that a partnership may to increase a newly incoming purchasing shareholder’s allocated portion of the entity’s own internal basis in its assets to reflect the purchase price of that stock and thus minimize the shareholder’s allocated gain upon the sale of those same assets. Worse still, upon liquidation, an S corporation is itself subject to capital gains tax -- and thus not treated as a complete pass-through entity -- although the former shareholders are allowed to increase their bases in any distributed appreciated assets by their proportionate shares of that tax.

S corporations may not have more than 100 shareholders (although family members are now treated as a single shareholder) who must all (except in the case of Qualified Subchapter S Subsidiaries as previously discussed) be individuals who are not nonresident aliens; estates; certain kinds of trusts; or “qualified tax-exempt shareholders.”

The shares of an S corporation must consist of only one class of stock, although some differences, such as different voting rights, within that single class are permitted so long as they do not amount to economic preferences.

These rigidities of the equity capitalization of S corporations obviously compare unfavorably to the complete flexibility available to LLCs (especially Series LLCs), partnerships, and C corporations.

However, S corporations do provide one important tax benefit that partnerships (including LLCs) do not -- in regard to employment taxes. The deemed dividends of an S corporation, i.e., all of its passed-through net income, are not treated as earned income for purposes of employment taxes, whereas all the income of partners except for limited partners ordinarily is so treated. (Limited partners are only required to report any “guaranteed payments” that they receive from their partnerships in return for their services, if any, as employment income.) This factor can by itself make S corporations more desirable than partnerships from an overall combined tax standpoint in a great variety of situations. One such situation has long been their use as the general partners(s) of limited partnerships. Another is their increasingly common use as the managers of manager-managed LLCs, the non-managing members of which may thus become comparable to limited partners and thus escape any employment taxes on their passed-through income other than any guaranteed payments for services performed (although this favorable result is not so nearly certain in the case of LLCs as it is in the case of limited partnerships, where it is required by statute: see I.R.C. Section 1402(a)(13)).

Illinois’ income tax treatment of limited liability entities generally follows their federal income tax treatment except for the applicable rates.

Illinois' personal property replacement tax, it should be mentioned, is 2 ½ percent upon C corporations and 1 ½ percent upon LLCs, partnerships, and S corporations except that single-members LLCs are disregarded for purposes of that additional tax.

D. FEDERAL, STATE, AND LOCAL STATUTES GOVERNING LLCs

Apart from the LLC statutes of all the states (and the District of Columbia), there are no federal, state, or local statutes that specifically deal with LLCs. As noted above, even the Internal Revenue Code does not make specific reference to LLCs, the federal income tax treatment of which is determined by the "check - the - box" regulations and those state law entities' elective status under them.

Of course, membership and other economic interests in an LLC can constitute securities governed by the federal and state securities laws. Even membership interests in member-managed LLCs, which are akin to general partnerships in terms of the theoretical control of the entity by all the members, have been found to be securities where the members at large had little effective control. *SEC v. Parkersburg Wireless, LLC*, 991 F.Supp.6 (D.D.C. 1997). The membership interests of nonmanaging members in a manager-managed LLC are securities by their very nature at least unless the members have no expectation of deriving a profit from their investment.

As legal entities separate and distinct from their members or managers, LLCs may seek bankruptcy protection even though none of their members or managers is personally liable (except in the most unusual circumstances) for their debts.

They must also, like all other businesses, comply with all federal, state, and local laws governing the particular businesses in which they engage.

E. MULTI-STATE OPERATIONS

Upon proper application, Illinois admits foreign limited liability companies to transact any business in this state that Illinois limited liability companies may transact. Yet, as has been seen, it is the laws of the other state or jurisdiction under which the foreign LLC is organized that govern its organization, internal affairs, and the liability of its managers, members, and their transferees. 805 ILCS 180/45-1(a). A foreign LLC may not be denied admission by reason of any difference between those laws and the laws of Illinois. 805 ILCS 180/45-1(b).

The requirements for such an application to transact business are set forth in 805 ILCS 180/45-5, and the requirements regarding the foreign LLC's registered agent and reports to the Secretary of State in 805 ILCS 180/45-30.

The statute lists a number of activities that do not constitute transacting business. ILCS 180/45-47. However, even if the foreign LLC does transact business without having been admitted to do so, its members are not liable for its debts and obligations solely by reason of that violation of the statute. Instead, the LLC is liable for certain fairly modest financial penalties and is debarred from bringing (but not defending) any civil action in an Illinois court until the LLC is properly admitted to transact business in Illinois. 805 ILCS 180/45-45.

Other states' LLC laws may or may not provide for reciprocal treatment of Illinois LLCs that transact business in those states. Thus, before commencing multi-state operations, an Illinois LLC should obtain informed advice about the foreign LLC qualification requirements and all other applicable legal requirements of all the other states in which those operations will be conducted.

This permissible lack of reciprocity poses a special risk in regard to Series LLCs, which are recognized in Illinois but not in most other states. It would be prudent to assume that any

transaction of business in such a state by a series of an Illinois Series LLC will be treated as the transaction of business by the Series LLC itself including all its other series, and that any liabilities of the series resulting from the transaction of that business will be likewise treated as the liabilities of the Series LLC itself and all its series.

F. FINANCIAL CONSIDERATIONS

The use of LLCs facilitates the financing of a great variety of business ventures because an LLC has all the inherent flexibility of a partnership. Indeed, it has even greater flexibility because, while being operated much like a partnership, it may elect to be treated for tax purposes as an S corporation (if it is eligible) or a C corporation. In that way, an LLC may at a time of its members' choosing participate in tax-free reorganizations.

If the business plan of the owners of an LLC calls for an eventual public offering of its equity, the LLC may have to be dissolved and reconstitute itself as a C corporation in order to meet the listing requirements of stock exchanges. In that case, it would ordinarily be desirable for the entity to have been a C corporation for some years in advance of the public offering.

Ordinarily, as has been seen above, any publicly traded partnership must be taxed as a C corporation, anyway. I.R.C. §7704. However, if 90 percent or more of such a partnership's (or LLC's) income is "qualifying income" as defined by § 7704(c), then partnership tax treatment is still permitted.

There are in fact a growing number of Master Limited Partnerships listed on the New York Stock Exchange, and at least one publicly traded LLC (Linn Energy) listed on Nasdaq. Thus, if an LLC can continue to meet the above-mentioned "qualifying income" test, it is possible for it to go public while retaining an LLC structure.