

SERIES LLC STATES CLARIFY THE FILING OF UCC-1 FINANCING STATEMENTS BY SECURED CREDITORS OF A SERIES



“The main way to perfect a security interest is by filing a UCC-1 financing statement with the Secretary of State (or similar filing office) in the state where the debtor is located.”

Series LLCs have been around since 1996. That’s when Delaware amended its LLC law to permit an LLC to establish in its LLC agreement one or more series, each with characteristics similar to that of a separate LLC, including having its own members, managers, assets, and purposes. The law also provided that if certain notice and recordkeeping requirements were met, each series would be responsible for its own debts and liabilities.

That internal liability shield — which protects the assets of a series from the liabilities of any other series and from the Series LLC itself — would seem to make the Series LLC an attractive option for many kinds of businesses and business transactions. And indeed in the first twenty years or so after Delaware enacted its law, fourteen states enacted their own Series LLC laws, most based on Delaware’s. Many Series LLCs were formed and series established but not nearly as many as might have been expected. That’s due largely to certain unanswered questions concerning the use of series.

One of the most significant of those questions was whether a secured creditor of a series could perfect its security interest by filing a UCC-1 financing statement pursuant to Article 9 of the Uniform Commercial Code (UCC). This article discusses why the answer to this question was unclear and what Delaware and some other states with Series LLC laws have done in the last two years to resolve the uncertainty.

PERFECTING A SECURITY INTEREST UNDER UCC ARTICLE 9

The Series LLC laws provide that a series may hold assets and grant liens and security interests in those assets. And certainly, the usefulness of the Series LLC would be severely compromised if a series couldn’t. The problem was getting a lender to loan money if the lender wasn’t sure how to perfect its security interest in the assets the series put up as collateral.

The main way to perfect a security interest is by filing a UCC-1 financing statement with the Secretary of State (or similar filing office) in the state where the debtor is located. But when it was a series established under Delaware law, or one of the states whose Series LLC law was based on Delaware’s, three questions complicated matters:

1. Was a series a “debtor” for UCC purposes?
2. If so, where was it located?
3. What was its name?

Each question deserves some further explanation.

continued on page 2

This information is not intended to provide legal advice or serve as a substitute for legal research to address specific situations.

WHO IS A DEBTOR FOR UCC PURPOSES?

Article 9 of the UCC (which has been adopted by each Series LLC state) governs this method of perfection. UCC Sec. 9-102(a) (28) defines a debtor as a “person”. A “person” is defined in UCC Sec. 1-201(b)(27) to include an individual and a list of non-individuals including corporations, LLCs, partnerships, trusts, estates, joint ventures, associations, and other legal or commercial entities. A series is not included. And it was not certain whether a series fit into any of these other categories.

WHERE IS A SERIES LOCATED?

A financing statement is filed where the debtor is located. Pursuant to UCC Sec. 9-307, a “registered organization” files in the state where it is organized. A “registered organization” is defined by Sec. 9-102(a)(71) as an organization organized solely under the law of a single state by the filing of a public record. Organizations that are not registered organizations file in the state where its place of business is located, and if more than one, where the chief executive office is located.

Under Delaware law as originally enacted (and in those states whose law was based on Delaware’s), a series is established in the LLC agreement. No public filing is made to form the series, which left lenders unsure where to file — and searchers where to search. Was it the formation state of the Series LLC itself, the state where the series had its main office, where the Series LLC had its main office, any or all of the above?

WHAT’S THE SERIES’ NAME?

Naming the debtor on a UCC-1 is a crucial step. Get it wrong, and the financing statement may not be effective, rendering the debt unsecured.

Delaware’s approach was to not have any requirements concerning the name of the series, which once again caused confusion for UCC filers and searchers.

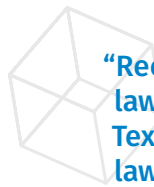
HOW DELAWARE AND OTHER SERIES LLC STATES ADDRESSED THE UNCERTAINTY UNDER UCC ARTICLE 9

Recently, states have begun to address the uncertainties surrounding series and secured lending transactions.

Delaware amended its Series LLC law, effective August 1, 2019, to address these issues. One amendment states that a series is an “association” for purposes of Delaware law. As an

association, it is a “person” and thus can be a “debtor” under Delaware’s UCC law.

The amendments also permit a Series LLC to establish what it refers to as a “registered series”. A registered series is formed by filing a certificate of series registration with the Delaware Secretary of State. Because it is formed by filing a public record, a registered series should be considered a registered organization, and a UCC-1 would be filed with the Delaware Secretary of State.



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Delaware also amended its UCC law to state that a series will constitute a registered organization if formed under the laws of a state that requires a public filing for its formation.

In addition, Delaware imposes requirements regarding the name of a registered series. Its name must begin with the full name of the Series LLC and must be distinguishable from the names of other registered series and domestic and qualified foreign entities on the Secretary of State’s records.

Elsewhere, Texas, which enacted a Series LLC law similar to Delaware’s in 2009, recently adopted similar amendments to those adopted by Delaware. Effective June 1, 2022, Texas Series LLCs will have the option of establishing registered series that are formed by a certificate of registered series filing with the Texas Secretary of State.

Texas has naming requirements including that the name will have to contain the phrase “registered series” or abbreviation RS. Texas also amended its UCC law to provide that the term registered organization includes a series of a registered organization if the series is formed or organized under the laws of a single state, and the statute of the state governing the series requires that the public organic record of the series be filed with the state.

In addition, some of the most recently enacted Series LLC laws have been based upon the Uniform Protected Series Act (UPSA). The UPSA was drafted by the Uniform Law Commission, the same organization responsible for the UCC, the Uniform LLC Act, and other uniform laws.

continued on page 3

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The UPSA, which has been adopted by four states in the last two years, takes a different approach than Delaware and Texas. Under the UPSA, a series (which it refers to as a “protected series”) is formed by filing a protected series designation with the state. There is no choice as there is in Delaware and Texas — which provide the option of a series formed by a public filing or a series established in the LLC agreement.

The USPA has naming conventions for each series. The series must begin with the name of the LLC, contain the words “protected series” or abbreviation thereof, and comply with whatever other naming requirements are imposed on the LLC itself.

Thus, the UPSA approach should also provide more certainty to secured lenders of a series as to how to perfect their

security interest under Article 9 and to anyone conducting a search for liens on a series’ assets.

CONCLUSION

The Series LLC can be a useful tool under the right circumstances. But uncertainty as to how to perfect a security interest in a series’ assets when the series was not formed by filing a public record has been a concern for some people considering using a Series LLC.

Recent changes to the Series LLC and UCC laws of some states, including Delaware and Texas, and the drafting of a uniform series LLC law, address those concerns and may spur a renewed interest in this entity. The Secretaries of State in these states may soon be seeing an increase in filings to form Series LLCs and to form individual series. Time will tell.