

WHO HOLDS THE ASSETS IN A DELAWARE SERIES LLC?

by

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According to records of the Delaware Secretary of State, more than 96,000 Delaware limited liability companies (“Delaware LLCs”) were formed in 2006. Delaware LLCs are increasingly the entity of choice for operating companies, and figure prominently in a great many structured finance transactions as so-called special purpose entities. The Delaware Limited Liability Company Act, 6 Del. C. § 18-101, *et seq.* (the “Delaware LLC Act”) facilitates the formation of Delaware LLCs with attributes carefully crafted to meet the needs of a given application, and is regularly revised so as to best assure that Delaware LLCs can be crafted to meet the ever-developing needs of the marketplace. For a number of years, the Delaware LLC Act has permitted the formation of Delaware LLCs with separate series of members, managers, and limited liability company interests.

In the legislative session ended June 30, Delaware’s General Assembly passed Senate Bill 96 (“SB 96”) amending the Delaware LLC Act. SB 96 was signed into law by Governor Minner, and took effect on August 1, 2007. Among other things, SB 96 provides a number of options for the holding of assets associated with a series. These options provide maximum flexibility, and so accommodate the needs of a great many constituencies. Inevitably, some options are better suited to some applications than others. This article considers the interplay between the Delaware LLC Act provisions relating to series and perfection of security interests by filing under Article 9 of the Uniform Commercial Code (“Article 9”).

Those dealing with the creation and perfection of security interests in assets associated with a series of a Delaware LLC must be particularly careful in identifying their “debtor” (that is, the person having an interest in the collateral at issue, within the meaning of Article 9 § 102(a)(28)), and answering each question that follows from that threshold issue. In the years since (revised) Article 9 took effect, most of us have become comfortable that a Delaware LLC is a “registered organization” within the meaning of Article 9 § 102(a)(70). Thus, a Delaware LLC is “located” in Delaware under Article 9 § 307(e), and a financing statement identifying a Delaware LLC as “debtor” must feature the Delaware LLC’s name (only) in box 1a as indicated in Article 9 § 503(a)(1) and be filed in Delaware pursuant to Article 9 § 301. But things may be very different if we’re considering assets associated with a series. As revised by SB 96, Section 18-215 of the Delaware LLC Act provides in relevant part as follows:

- (b) . . . Assets associated with a series may be held directly or indirectly, including in the name of such series, in the name of the limited liability company, through a nominee or otherwise.
- (c) A series established in accordance with subsection (b) of this section . . . shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued.

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

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

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

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

As suggested above, having determined who is the "debtor" with respect to the relevant assets and having had such debtor effectively grant the desired security interest, interested parties must determine the proper characterization of such debtor for purposes of determining where to file a financing statement against it, and determine its name and other information for purposes of completing such financing statement. If the debtor is the Delaware LLC itself, these questions are easily answered. If the debtor is a nominee, these questions should be easily answerable by consideration of the relevant attributes of that nominee under Article 9. But if the debtor is the series, questions remain as to the characterization of the debtor and thus its location for purposes of Article 9 § 307 (that is, where to file), and what name, organizational ID number (if applicable – Delaware does not require organizational ID numbers on financing statements), and other identifying information to provide on a financing statement (that is, what to file). The same issues will appear in the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101, *et seq.*, if Senate Bill 95, which is substantially similar to SB 96 discussed above, becomes law.