

## COMMENTARY TO DEAN FERSHÉE'S PRESENTATION

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First of all, thank you to Dean Fershée for taking the time to speak at the symposium, as well as Professor Kuney for bringing his insight to the conversation. Also, thank you to Autumn Bowling and everyone on *Transactions* that made today possible.

I would like to build upon Dean Fershée's discussion by examining it in the context of series Limited Liability Companies (LLCs). I get that any overview may be preaching to the choir, by virtue of you all being at a transactional law CLE on a Friday morning, but humor me here. The series LLC is a relatively novel entity, first created by statute in Delaware in 1996.<sup>1</sup> The gist of the series LLC is this: the LLC exists as a number of series, each a discrete unit having its own assets and obligations.<sup>2</sup> However, unlike unincorporated divisions within a larger corporation, each series is recognized by law as a separate entity.<sup>3</sup> Each series is exclusively liable for its own obligations, and creditors' claims may only be satisfied using the assets of that series, effectively shielding the other series within an LLC from liability.<sup>4</sup>

In this way, the series LLC acts as an *internal* liability shield. Obviously, the upstart entrepreneur is significantly less concerned with the threat of internal liability than with the *external* liability shield of a regular LLC, which protects her own personal assets from being used to satisfy creditors.<sup>5</sup>

But the series LLC implicates Dean Fershée's thesis in that if common and sole ownership of an entity means a near-automatic finding that the

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<sup>1</sup> *Does a Series LLC Provide Extra Protection Against Piercing the Corporate Veil?*, EMINUTES BLOG (Nov. 3, 2017), <https://eminutes.com/does-a-series-llc-provide-extra-protection-against-piercing-the-corporate-veil>.

<sup>2</sup> DEL. CODE ANN. tit. 6, § 18-215(b) (2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Series LLC*, *supra* note 1.

LLC is the alter ego of the owner, it becomes all the more likely that a court will also endeavor to disregard the form of the series LLC, reaching the assets of *all* series within it.<sup>6</sup>

Why is this? The Supreme Court of Hawaii in *Calipjo v. Purdy*<sup>7</sup> effectively showed a tendency to treat sole ownership and control of entities as dispositive of alter ego liability, rather than treating them as factors in determining the equitability of veil piercing.<sup>8</sup> The existence of only one shareholder is often viewed by courts as some proof of fraud, but this fiction often operates against other quite legitimate and impactful factors germane to veil piercing: severe undercapitalization, lack of corporate formalities, actual fraud, or misrepresentation by owners.<sup>9</sup> But as Dean Fershée points out, the mere employment of a statutorily provided entity to limit liability does not inequity make. Any limit on liability that is deemed to be unseemly should be addressed legislatively, and uses of approved forms of entities should not be so readily disregarded.

It is not hard to draw a logical through line from the court's willingness to pierce the veil of a sole owner's LLC to a potential willingness to pierce the internal veils of a series LLC. Common ownership, as well as interaction between the series within the LLC, have the potential to persuade the court to visit liability upon all series.<sup>10</sup> Further, the uninformed owner of a series LLC may fail to meet the rigorous recordkeeping responsibilities placed upon each series, leading to an even stronger showing of commingling and lack of formality that makes the court's decision to pierce the series' veils even easier.<sup>11</sup> Yet, once again, this form is designed *by legislation* to provide this level of liability limitation. One could hardly fault an owner, following all statutory prerequisites, for taking advantage of the admittedly attractive prospect of cordoning liability of one series to that one series alone.

Of course, none of this is guaranteed to have an appreciable effect on the liability limitations of series LLCs, but I feel it is important to consider

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<sup>6</sup> Alberto R. Gonzales & J. Leigh Griffith, *Challenges of Multi-State Series and Framework for Judicial Analysis*, 42 J. CORP. L. 653, 704 (2017).

<sup>7</sup> 439 P.3d 218 (2019).

<sup>8</sup> *Id.* at 231–32.

<sup>9</sup> In re Opus E., LLC, 528 B.R. 30, 57–58 (Bankr. D. Del. 2015).

<sup>10</sup> *Calipjo*, 439 P.3d at 231–32.

<sup>11</sup> See *Series LLC*, *supra* note 1.

the willingness of courts to sometimes disregard the limited liability of LLCs within the context of the more horizontally-oriented series LLC.