## Memorandum

**TO:** Members of the SBUE Subcommittee on Bankruptcy Law

**FROM:** Daniel S. Kleinberger, Reporter

**SUBJECT:** Attributes of a Series – Spectrum Analysis

**DATE:** June 13, 2013

The Drafting Committee has identified multiple questions concerning how best to configure the series construct -i.e., what "setting" to use as to each of the many characteristics of a series. The Committee has an evolving list of questions, including tentative decisions, but that list is not organized in a manner that facilitates discussion of bankruptcy law issues.

As requested in the most recent teleconference of the Subcommittee, the chart below lists sets of issues that are arguably relevant to our ongoing bankruptcy law discussions. For each issue, the chart includes three "settings" along a spectrum: non-entity pole of the spectrum; middle of the spectrum (more or less); and entity pole of the spectrum.

Many of the listed issues have not been addressed in any series statute. As to such issues:

- Where a non-criminal state statute could comprehensively address the matter, the chart indicates possible alternatives.
- Where a non-criminal state statute cannot adequately address the matter, the chart indicates *in italics* the Reporter's current, tentative thoughts.

formal separateness vel non			
issue	non-entity pole of the spectrum	middle of the spectrum (more or less)	entity pole of the spectrum
termed by statute as an entity separate from the organization	opposite is stated	no (not addressed)	yes <sup>1</sup>
public filing necessary to create	no	organization document must indicate possibility	yes

<sup>&</sup>lt;sup>1</sup> No series statute takes this position, although Illinois comes close.

extent of entity-like powers	limited – e.g., USTEA § 403(a) (series has no capacity to sue or be sued in its own name)	all except: engage in organic transactions; exist outside or in the absence of the organization; and create a series	all
ability to exist separate from the organization	no	no – winding up of the organization necessarily involves dissolution, winding up, and termination of every series	no, as a default rule, but agreement can provide that, upon the dissolution of the organization, a series may take an escape pod (i.e., become an entity in its own right) <sup>2</sup>
separate annual/biennial report	no	undetermined	yes
must name of series indicate series status (either by reference to the organization or through use of a designator [indicating series status generically])	yes as to both	undetermined	no
association of persons with series			

issue	non-entity pole	middle (more or less)	entity pole
must "associates" of the series be members <sup>3</sup> of the organization <sup>4</sup>	yes	yes	no

<sup>&</sup>lt;sup>2</sup> No series statute so provides. At the moment, this concept is but "[a] dagger of the mind, ...proceeding from the heat-oppressed brain" of the Reporter.

<sup>&</sup>lt;sup>3</sup> Because the Drafting Committee is focusing initially on series for LLCs, this chart uses the LLC term "member" to stand for the notion of a co-owner of the organization.

<sup>&</sup>lt;sup>4</sup> Series statutes typically refer to members of the organization as being "associated" with a series. "Association" is thus the term of art for providing members of the organization, economic rights,

<sup>&</sup>quot;Association" is thus the term of art for providing members of the organization, economic rights, governance rights, or both *viz a viz* a series.

consequences if a	managed by, and	managed by, and	managed by, and
series has no	economics flow to,	economics flow to,	economics flow to,
associated members	the organization	the organization	the organization
	management by or		
may organization be	no <sup>5</sup>	no <sup>6</sup>	undetermined
associated with a			
series			
may one series be	no	perhaps <sup>7</sup>	yes
associated with			
another series			

## governance relationships between organization and series

issue	non-entity pole	middle	entity pole
		(more or less)	
relationship of	some connection	default rule:	none, unless expressly
management of the	required – e.g.,	organization manages	provided by
organization to	USTEA § 404 <sup>8</sup>	each series	agreement
management of the			
series			
relationship of	organization's	organization's	undetermined
organization's	document	document	
fundamental	controls in case of	controls in case of	
agreement to series-	conflict	conflict	
specific agreements			

<sup>&</sup>lt;sup>5</sup> Why? Because membership in the organization is a prerequisite to association with a series, and the organization cannot be a member of itself.

<sup>&</sup>lt;sup>6</sup> See n. 5.

<sup>&</sup>lt;sup>7</sup> For "perhaps" to become "yes," a series would have to be a member of the organization. LLC membership is an amalgam of contractual and property rights, and, at this point on the spectrum, a series has the power to make contracts and own property in its own name. Can a series of LLC members itself be a member of the same LLC? Seems a lot like a snake swallowing its tail.

<sup>&</sup>lt;sup>8</sup> Section 404, Duties of Trustee in Series Trust, states: "If there is at least one trustee of a series trust that, in discharging its duties, is obligated to consider the interests of the trust and all series thereof, the governing instrument may provide that one or more other trustees, in discharging their duties, may consider only the interests of the trust or one or more series thereof."

ownership of property			
issue	non-entity pole	middle (more or less)	entity pole
who owns the assets of a series and in whose name are those assets titled	organization <sup>9</sup>	either, provided that the records clearly and specifically indicate the assets associated with each series <sup>10</sup>	series
attribution issues <sup>11</sup>			
service of process – who served	organization	undetermined	serve the applicable "entity"
jurisdiction of foreign state – attribution re: sufficient contacts?	yes	undetermined	no
*foreign registration – attribution re: transacting business	likely	undetermined	no
foreign registration – filing: does organization file for any and all series	yes	undetermined	no
subject to criminal liability independent of the organization	arguably no	unknown	likely

\_

<sup>&</sup>lt;sup>9</sup> See USTEA § 401(a) (referring to "the creation by the statutory trust of one or more series with respect to specified property of the statutory trust) and Prefatory Note, Series Trusts (stating that "[u]nder the structure of this act, a series is a segregation or partitioning of property within a statutory trust"). But see USTEA § 401(a)(1) (referring to recordkeeping methods "by which the identity of the property of the series is objectively determinable") (emphasis added to all quotations).

<sup>&</sup>lt;sup>10</sup> Another possibility: all property owned by (and, where relevant, titled to) the organization; when property becomes associated with a series, the organization retains legal ownership but as a trustee. As complicated as this approach would be, it might: (i) respond to our Article 9 issues; and (ii) avoid recording requirements, transfer taxes, and similar headaches.

<sup>&</sup>lt;sup>11</sup> *I.e.* – to what extent is the conduct of a series attributable to the organization, another series, and *vice versa*.

capacity to conspire;	arguably no	unknown	likely
to aid & abet			
(including with other			
series and the			
organization itself)			