

Possible Topics for PSA Internet Meetings
dsk - 9-17-16

1. Section 402 – redux
2. Should a protected series be permitted to participate in a merger?
 - a. Is there sufficient interest for a subcommittee to work through how far express, specific extrapolation would take us?
3. What should the act do with pre-existing domestic protected series (i.e., in states that already have an act)?
 - a. At first glance, the only difficult issue is the relationship between the public filing and the internal shields.
 - b. Two possibilities (so far):
 - i. After long drag-in period, internal shields fall (the “Jericho Approach”).
 - ii. Shields remain (subject to other provisions of the act, including recordkeeping, Section 402) and disclosure-upon-proceeding provisions of Article 6 apply.
4. Should the prohibition on a protected series owning an interest in another series apply to indirect as well as direct holdings (e.g. through a SMLLC)?
5. Should the act use “series” as shorthand (i.e., for second and subsequent references in a subsection)? E.g., “protected series transferable interest” the first time; later references in the same subsection would be to “series transferable interest”.
6. Is the act too demanding?
 - a. Harry comparison memo (big picture)
 - b. Recordkeeping requirements
 - c. Specific requirement that inter-family transferor must maintain records¹
7. Charging order issues – what must a judgment creditor do to reach a judgment debtor’s protected series transferable interest?
 - a. In particular, should the act state that following the process specified at the LLC level encompasses any interests held at the protected series level?
 - b. Would doing so require a trailing amendment in ULLCA, to define “transferable interest” to include distributions from protected series?
 - i. query the ripple effect w/r/t provisions pertaining to “series transferable interests”
 - c. The current draft does not directly answer this question.²

¹ A. The recordkeeping we seek from the transferor is basic to any competently run business. Can you imagine a business transferring property and not having a record of the purchase price (if any) and the purchaser?

B. The transferor’s failure to have the record is irrelevant to whether the transferee has associated the transferred property. For that purpose, it is the transferee’s records which matter.

C. The transferor’s failure to have the record would matter only as one fact in a piercing case – failure to observe non-governance formalities.

D. Why do we want it? It’s like double-entry bookkeeping.

² SECTION 403. REMEDIES OF JUDGMENT CREDITOR. Any provision of [the limited liability company statute – see, e.g., Uniform Limited Liability Company Act (2013), Section 503] which provides or restricts remedies available to a judgment creditor of a member of a limited liability company or owner of a transferable interest of the company applies to a judgment creditor of:

(1) an associated member or protected series transferee of a protected series; or

8. Do we need a particularized extrapolation for each LLC statute provision that transcends internal affairs? Possibly:
- a. Section 107(c) states: “If neither the operating agreement nor this [act] provides for *a matter described in subsection (a)*, [the limited liability company statute] governs the matter according to the rules stated in Section 103.” (Emphasis added.)
 - b. Subsection (a) encompasses two types of *internal* affairs – within a protected series; within the series limited liability company, but involving a protected series).
 - c. Charging order provisions are not internal affairs, and the act has a particularized extrapolation provision for remedies of judgment creditors.³
 - d. What about of distribution limitation and clawback provisions (e.g., ULLCA §§ 405, 406)?
 - i. Although some courts have held that creditors have no standing to enforce distribution limitations and clawback provisions, these provisions nonetheless serve to benefit creditors.
 - ii. Arguably, therefore, these provisions are not internal affairs, are not within Section 107(a), and therefore are not subject to extrapolation under Section 107(c).
 - iii. Drafting a particularized extrapolation provision would not take much time – i.e., something like the following should suffice: “A provision of [the limited liability company act] limiting distributions by a limited liability company or providing remedies for unlawful or otherwise improper distributions applies to a distribution made by a protected series according to Section 103.”
 - e. We need to identify any other candidates for “particularized extrapolation.”

(2) the series limited liability company, to the extent it owns a protected series transferable interest of the protected series.

³ Section 403, quoted in the above note.