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member or assignee, not just judgment creditors. The principle that limited liability company property is not available to satisfy liabilities of members or holders of limited liability company interests parallels and reinforces other provisions under the DLLC Act. For example, it accords with the nature of the limited liability company interest as personal property⁴⁹⁵ and the legal separateness of the company from its members and others.⁴⁹⁶

[D] Jurisdiction of the Court of Chancery of the State of Delaware

The Delaware Court of Chancery has jurisdiction to hear and determine any matter relating to any charging order under Section 18-703 of the DLLC Act.⁴⁹⁷

§ 5.22 SERIES OF MEMBERS, LIMITED LIABILITY COMPANY INTERESTS AND ASSETS

[A] Overview

Section 18-215(a) of the DLLC Act states that the limited liability company agreement may establish or provide for the establishment of one or more designated series of members, limited liability company interests, or assets.⁴⁹⁸ Pursuant to that Section, any such series may have “separate rights, powers or duties with respect to specified property or

⁴⁹⁵ 6 *Del. C.* § 18-701; *see supra* § 5.12.

⁴⁹⁶ 6 *Del. C.* § 18-201(b); *see supra* § 2.05.

⁴⁹⁷ 6 *Del. C.* § 18-703(f).

⁴⁹⁸ 6 *Del. C.* § 18-215(a). Section 18-215(a) also allows for the establishment of series of managers. *See infra* § 9.10.

Unlike Section 18-302, which refers simply to “classes or groups” of members and limited liability company interests, *see* 6 *Del. C.* § 18-302(a), Section 18-215 permits the creation of “designated” series of members or limited liability company interests. This distinction suggests that a series created under Section 18-215 must bear some formal designation. The statutory flexibility regarding the designation that may be affixed to a class or group of members or limited liability company interests, *see supra* §§ 5.05, 5.09, applies equally to the designation of a series of members or limited liability company interests. The DLLC Act sets forth no criteria regarding such a label. Thus, a series designation may be descriptive (e.g., “Manufacturing Division Series” or “Index Fund Series”) or arbitrary (e.g., “Series 2038”).

obligations of the limited liability company or profits and losses associated with specified property or obligations.”⁴⁹⁹ Moreover, any such series may have “a separate business purpose or investment objective.”⁵⁰⁰

Assessed in isolation, the foregoing series provisions can seem largely redundant, simply confirming flexibility that already exists under other provisions of the statute.⁵⁰¹ From this viewpoint a series of members or limited liability company interests amounts to no more than a “class” or “group” of members or limited liability company interests. Even without Section 18-215(a)’s authorization of particular terms pertaining to a series (e.g., separate investment objective), the flexibility under the DLLC Act is sufficient to permit the establishment of these terms in the limited liability company agreement and they could thereby apply to a member or limited liability company interest or a class or group thereof. Put differently, the features of a particular series of limited liability company interests or members created pursuant to Section 18-215(a) may result in that series being substantively indistinguishable from a class or group of such interests or persons.⁵⁰² Although this perspective on series under the DLLC Act is not necessarily inaccurate, it is incomplete, because other provisions in Section 18-215 beyond subsection (a), especially those in subsection (b), make clear that the series concept under the DLLC Act offers more than simply an alternative method to achieve a result that is otherwise attainable by utilizing the statute’s contractual flexibility or class or group provisions. If properly structured and implemented, a series of members, limited liability company interests, or assets under the DLLC Act may possess further attributes that under the statute pertain uniquely to series⁵⁰³ and that offer to business planners benefits that are relatively novel.

⁴⁹⁹ 6 *Del. C.* § 18-215(a).

⁵⁰⁰ 6 *Del. C.* § 18-215(a). Consistent with the DLLC Act’s general enabling approach, *see supra* § 1.03[A][1], the word “or” as used throughout Section 18-215(a) should not be construed restrictively.

⁵⁰¹ *See, e.g.*, 6 *Del. C.* § 18-302(a); *see supra* §§ 5.01[B][1], 5.05, 5.08[D], 5.09.

⁵⁰² In that case, a series of limited liability company interests, like a class or group of such interests, is analogous to a class or series of stock of a corporation, and the members of a series, like members of a class or group, are comparable to stockholders holding shares of a class or series of stock. *See supra* § 1.04[C][1].

⁵⁰³ Other Delaware business entity statutes contain provisions regarding series that are similar to Section 18-215 of the DLLC Act. *See* 6 *Del. C.* § 17-218 (regarding series of partners, partnership interests, or assets); 12 *Del. C.* §§ 3804(a), 3806(b)(2), 3812(f) (regarding series of trustees, beneficial owners, or beneficial interests). Section 18-215 in fact derives from the series provisions originally included in the Delaware Business Trust

Section 18-215(b) of the DLLC Act makes available with respect to a designated series of members, limited liability company interests, or assets certain liability limitations and protections traditionally expected only at the entity level. In general, upon establishment of a series in accordance with Section 18-215(a) and upon compliance with requirements set forth in Section 18-215(b), creditors' recourse in regard to liabilities of the series is limited to assets associated with that series; in seeking satisfaction of a series-specific liability, creditors of the series may not reach company assets that are not associated with that series (i.e., assets of another series or assets of the company generally).⁵⁰⁴ Moreover, unless otherwise provided in the limited liability company agreement, liabilities of the company generally and liabilities of another series are not enforceable against the assets of a series.⁵⁰⁵ (A company that has established and implemented one or more series in compliance with Section 18-215(b) of the DLLC Act is commonly referred to as a "series limited liability company.") This opportunity for segregation of assets and liabilities within a single limited liability company is the primary attraction of the series concept under the DLLC Act.

Although a series of members, interests or assets that complies with Section 18-215(b) is not a separate legal entity,⁵⁰⁶ that series will "be

Act (now the Delaware Statutory Trust Act, 12 *Del. C.* § 3801 *et seq.*). Delaware's captive insurance company statute also provides for features analogous to those applicable to a series under Section 18-215(b) of the DLLC Act. *See* 18 *Del. C.* § 6934 (regarding protected cells within a sponsored captive insurance company).

⁵⁰⁴ 6 *Del. C.* § 18-215(b); *see infra* § 5.22[B].

⁵⁰⁵ 6 *Del. C.* § 18-215(b); *see infra* § 5.22[B].

⁵⁰⁶ *See GxG Management LLC v. Young Brothers and Co., Inc.*, No. 05-162-B-K (D. Me. June 11, 2007) (series of Delaware limited liability company "is not a legal entity at all"); *cf.* 6 *Del. C.* § 18-201(b); *supra* § 2.05 (a Delaware limited liability company is a separate legal entity). In practice one question that arises from time to time is whether a "series" can be a member of a Delaware limited liability company or hold a limited liability company interest in that company. Pursuant to a 2006 amendment to Section 18-101 of the DLLC Act, a "series" is a "person" within the meaning of the statute. 6 *Del. C.* § 18-101(12); *see* 75 *Del. Laws*, c. 317, § 1; Appendix B. This amendment was intended primarily to confirm that membership in a Delaware limited liability company, a limited liability company interest in a Delaware limited liability company, and the status, rights, and obligations attendant thereto, may be assets (and, as appropriate, liabilities) associated with a series of a series entity. *See* 6 *Del. C.* § 18-301 (a "person," including "an assignee," may be admitted as a member of a Delaware limited liability company); *supra* §§ 5.01[A], 5.02[B]. The amendment was not designed to signify a change in the nature of a series under Section 18-215 of the DLLC Act, even one established in compliance with the requirements of Section 18-215(b). Such a series is not a separate legal entity,

treated in many important respects as if [it] were a separate limited liability company.”⁵⁰⁷ The liability limitations set forth in Section 18-215(b) represent the most prominent aspect of this treatment. Subsequent provisions in Section 18-215, however, also reflect and reinforce the “entity-like” character of a series that has been established in accordance with Section 18-215(b). These other provisions in Section 18-215 pertaining to series establish rules paralleling those elsewhere in the statute that apply to the company itself. For example, a series established in accordance with Section 18-215(b) “may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in § 126 of Title 8” and, unless otherwise provided in the limited liability company agreement, “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.”^{507.1} In addition, subsection (g) of Section 18-215 addresses management of a series,⁵⁰⁸ subsection (i) governs distributions with respect to a series,⁵⁰⁹ subsection (k) deals with termination of a series,⁵¹⁰ and subsection (l) controls winding up a terminated series.⁵¹¹ In fact, this last subsection specifically states that Section 18-804 of the DLLC Act, which governs the disposition of assets of a dissolved Delaware limited liability company during its winding up process,⁵¹² “shall apply to the winding up and distribution of assets of a series.”⁵¹³ These provisions in Section 18-215, in addition to

notwithstanding any attributes it may possess that vest it with many of the same features as the limited liability company itself.

⁵⁰⁷ 70 Del. Laws, c. 360, Synopsis § 9; *see infra* Appendix B.

^{507.1} 6 Del. C. § 18-215(c); *cf.* 6 Del. C. § 18-106(a) (“A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in § 126 of Title 8”).

⁵⁰⁸ 6 Del. C. § 18-215(g); *see infra* § 5.22[E]; *cf.* 6 Del. C. § 18-402 (management of limited liability company).

⁵⁰⁹ 6 Del. C. § 18-215(i); *see infra* § 5.22[F]; *cf.* 6 Del. C. § 18-607 (distributions by limited liability company generally).

⁵¹⁰ 6 Del. C. § 18-215(k); *see infra* § 5.22[H]; *cf.* 6 Del. C. § 18-801 (dissolution of limited liability company).

⁵¹¹ 6 Del. C. § 18-215(l); *see infra* § 5.22[I]; *cf.* 6 Del. C. § 18-803.

⁵¹² *See infra* § 16.06[E][2].

⁵¹³ 6 Del. C. § 18-215(l).

those in subsection (b), further foster the concept of a series as a quasi-entity.”⁵¹⁴

In light of the entity-like qualities of a series of members, limited liability company interests or assets created and implemented in accordance with Section 18-215(b), the establishment of such a series stands as an alternative to the formation of a separate entity. For example, instead of creating a subsidiary to hold a particular asset, a Delaware limited liability company could establish a series and provide that such asset and related liabilities “belong to” that series. Either approach (i.e., inter-entity or intra-entity compartmentalization of assets and liabilities) offers the possibility of shielding “parent” company assets from liabilities relating to a particular asset or activity.

As compared to organizing a separate subsidiary, the creation of a series in accordance with Section 18-215(b) clearly can offer advantages. No public filing (apart from the initial, properly worded certificate of formation⁵¹⁵) is needed to form a series under the DLLC Act. Accordingly, with no separate filing fees payable in connection with a series, the cost of establishing a series can compare favorably to the expense associated with forming a subsidiary. In addition, the ongoing burden of annual franchise taxes and the like, which must be paid in order to maintain a separate legal entity in many circumstances, is eliminated in Delaware with respect to a series of a limited liability company; while the company must pay annual tax under the DLLC Act,⁵¹⁶ no separate annual tax is payable under the statute in regard to any series of that company.⁵¹⁷

Despite the potential advantages to be gained by appropriately implementing the series concept under the DLLC Act, a prudent and practical-minded approach is recommended when determining the relative merits of a series Delaware limited liability company in a given situation. At this stage in the development of the law regarding series, the

⁵¹⁴ Notwithstanding the different ways in which Section 18-215 treats a series as if it were a separate legal entity, the DLLC Act does not endow a series with all of the attributes of a stand-alone company. For instance, the statute does not provide directly for the statutory merger of a series. *Cf.* 6 *Del. C.* § 18-209; *see infra* § 14.04[B].

⁵¹⁵ *See infra* § 5.22[B]; *see also supra* § 2.02.

⁵¹⁶ *See infra* § 17.01; *see also infra* § 18.06[A].

⁵¹⁷ Other jurisdictions, however, may adopt a different approach to taxation of a series limited liability company doing business in that jurisdiction. For instance, the California Franchise Tax Board has adopted the position that each series of a Delaware series limited liability company must pay its own separate annual tax in California if it is registered or doing business in that State.

decision to adopt the series approach instead of creating new, separate entities may be a less appealing alternative in many cases. It is to be expected that issues will arise in connection with efforts to satisfy Section 18-215(b)'s requirements regarding series. As a threshold matter, if the person drafting terms in the limited liability company agreement that create or provide for the creation of a series of members, limited liability company interests, or assets is dealing with unfamiliar subject matter, then extra care will be needed to properly document the mechanics of establishing a series and associated details. Once a series is established, compliance with the recordkeeping and related operational requirements under Section 18-215(b) is essential to achieve the protections of that Section limiting recourse of creditors.⁵¹⁸ Decisions will have to be made regarding the manner in which series records will be kept and the manner in which series assets will be held and accounted for, so as to comply with the requirements of Section 18-215(b). Depending on the nature and extent of the company's business activities and assets, adherence to those requirements may entail the dedication of significant resources. Due to parties' lack of familiarity with series, other administrative challenges also may be presented. Otherwise uncomplicated activities performed daily in the ordinary course of business, for example, properly documenting that an obligation is one "contracted for . . . with respect to a particular series"⁵¹⁹ of the series limited liability company, may involve at least initially more planning and preparation than is normally required to cause a conventional subsidiary to enter into an agreement.⁵²⁰

In electing whether to use a series limited liability company or other alternatives, perhaps the foremost factor to consider is the potential lack of certainty regarding the legal treatment of the series. Although the DLLC Act has authorized the creation of series since 1996, a number of basic questions relating to series remain open to discussion. A principal concern is the treatment of a series Delaware limited liability company in a jurisdiction other than Delaware, especially one that does not have laws recognizing the series concept. Among the central issues is whether

⁵¹⁸ See *infra* § 5.22[B].

⁵¹⁹ 6 *Del. C.* § 18-215(b).

⁵²⁰ Fortunately, since its initial enactment, see 70 *Del. Laws, c. 360, § 9, infra* Appendices B and C, Section 18-215 has been modified to facilitate the resolution of a variety of practical issues. Moreover, counsel and service providers through working with series entities have developed knowledge and gained experience that can assist parties seeking to implement and comply with the DLLC Act's series provisions.

Section 18-215(b)'s liability limitations will be respected and given effect in such a jurisdiction. The absence of clear or uniform legal authority regarding the treatment of series produces uncertainty and risk, especially when a series limited liability company becomes involved in litigation, or interacts with a governmental regulatory agency, outside Delaware.^{520.1} The enactment in the relevant foreign jurisdiction of a statute substantially similar to Section 18-901(a)(1) of the DLLC Act may provide some measure of assurance regarding the application of Delaware law to the liability limitations governing a series Delaware limited liability company.⁵²¹ The existence of such legislation, however, does not foreclose entirely the possibility that the recourse-limiting provisions in Section 18-215(b) may be disregarded in that jurisdiction. This possibility will be an important factor in any decision to structure an entity as a series limited liability company rather than pursue an alternative organizational arrangement.⁵²²

^{520.1} See *GxG Management LLC v. Young Brothers and Co., Inc.*, No. 05-162-B-K (D. Me. Feb. 21, 2007).

⁵²¹ See 6 *Del. C.* § 18-901(a)(1) (subject to constitutional provisions, the laws of a company's jurisdiction of formation "govern its organization and internal affairs"); *infra* § 18.02; *but see, e.g., Butler v. Adoption Media, LLC*, No. C04-0135 PJH (N.D. Cal. Aug. 26, 2005) (holding that a California statute substantially similar to Section 18-901(a)(1) of the DLLC Act "does not apply to disputes that include people or entities that are not part of the LLC").

⁵²² Contextual factors such as the risk profile of the proposed series also may play a role in the decision. For example, as a practical matter, the efficacy of the DLLC Act's provisions limiting liabilities and protecting assets of a series limited liability company may be less of a concern if the assets or activities (e.g., passive holding of investment securities) of different series are unlikely to give rise to associated liabilities, and may be of greater concern if those assets or activities (e.g., real estate holdings, manufacturing) are more prone to generate claims by non-consensual creditors. See *infra* § 5.22[B].

Also worthy of consideration in evaluating the option of using a series limited liability company are other aspects of the law applicable to such a company that may involve complexity or uncertainty. These include matters involving taxation of a series limited liability company (e.g., for purposes of: franchise tax or the like, see *supra* note 517; income taxation; and real estate transfer tax and similar assessments), treatment of a series in a bankruptcy context (fundamental issues include whether a bankruptcy petition can be filed with respect to a series as debtor and whether substantive consolidation principles apply at the series level), and reorganization transactions involving series (e.g., merger of a series limited liability company, see *supra* note 514; transfer of assets and liabilities between series).

[B] Limited Recourse with Respect to Series and Non-Series Liabilities

Pursuant to Section 18-215(b) of the DLLC Act, despite anything to the contrary set forth in the DLLC Act or under other applicable law, if certain statutory requirements are satisfied, then the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series are enforceable only against the assets of such series, and not against the assets of the limited liability company generally or of any other series thereof.⁵²³ Further, unless otherwise provided in the limited liability company agreement but again subject to the satisfaction of these statutory requirements, none of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the company generally or any other series thereof are enforceable against the assets of a particular series.⁵²⁴ These rules apply to a series

⁵²³ 6 *Del. C.* § 18-215(b).

⁵²⁴ 6 *Del. C.* § 18-215(b). The specific formulation of the recourse limitations in Section 18-215 is perhaps redundant in some respects (e.g., as it necessarily follows from the rule that liabilities of a series are “enforceable against the assets of such series *only*,” 6 *Del. C.* § 18-215(b) (emphasis added), it is unnecessary to repeat that such liabilities are not enforceable against non-series company assets or assets of another series; in light of the foregoing rule, it also is surplusage to state that “none of the . . . liabilities” of one series “shall be enforceable against the assets of [another] series,” 6 *Del. C.* § 18-215(b)); *but see infra* note 526. Any duplicative articulation of principles in Section 18-215(b) is intended to provide an added measure of clarity and to avoid uncertainty regarding the effect and scope of the stated rules.

Notwithstanding the rules under Section 18-215(b) and also notwithstanding the DLLC Act’s general rule that the debts, obligations, and liabilities of a Delaware limited liability company are non-recourse as to members and managers, *see* 6 *Del. C.* § 18-303(a), *supra* § 5.03[A], *see also infra* § 9.08[B][1], a member may agree, under the limited liability company agreement or another agreement, to be obligated personally for any or all of the debts, obligations, and liabilities of one or more series. 6 *Del. C.* § 18-215(d). Another person, such as a non-member holder of a limited liability company interest of a designated series, likewise may contractually undertake responsibility for series obligations. Neither Section 18-215(b) nor Section 18-303(a) states expressly that a person is not liable for the debts, liabilities, and obligations of a series solely by reason of being a member (or a holder of a limited liability company interest, or a manager) associated with that series. Still, this conclusion is entirely consistent with the text and tenor of the relevant statutory provisions. Section 18-303(a) shields certain limited liability company constituents from company liabilities, and liabilities “with respect to a particular series,” 6 *Del. C.* § 18-215(b), are still “liabilities of [the] limited liability company,” 6 *Del. C.* § 18-303(a), albeit “incurred, contracted for or otherwise existing” in regard to that series and “enforceable against the assets of such series only,” 6 *Del. C.* § 18-215(b).

only if the following requirements set forth in Section 18-215(b) are satisfied: (1) the limited liability company agreement must establish or provide for the establishment of such series under Section 18-215; (2) the records maintained for such series must account for the assets associated with such series separately from the other assets of the limited liability company or of any other series thereof;^{524.1} (3) the limited liability company agreement must “so provide[];”⁵²⁵ and (4) notice of the limitation on liabilities of a series as referenced in Section 18-215(b) must be set forth in the certificate of formation of the limited liability company.⁵²⁶

^{524.1} Section 18-215(b) includes a “safe harbor” regarding such records, providing that records maintained for a series that “reasonably identify its assets, including by specific listing, category, type, quantity, computational or allocational formula or procedure (including a percentage or share of any asset or assets) or by any other method where the identity of such assets is objectively determinable, will be deemed to account for the assets associated with such series separately from the other assets of the limited liability company, or any other series thereof.” 6 *Del. C.* § 18-215(b).

⁵²⁵ This reference presumably requires that the limited liability company agreement must “provide” for the substance of Section 18-215(b)’s limitation on enforcement of obligations of a particular series, which restricts such enforcement to assets of that series only and precludes enforcement against general company assets or assets of another series. The statute does not indicate that this contractual term must be *in haec verba* or that the agreement must “specify” the statutory “limitation on liabilities of a series.” 6 *Del. C.* § 18-215(b). Interestingly, the complementary protection afforded to series assets under Section 18-215(b), shielding the assets of a given series from enforcement of obligations of the company generally or of another series, because it is presented as a default rule, need not be “so provide[d]” in the limited liability company agreement and applies “unless otherwise provided in the limited liability company agreement.” 6 *Del. C.* § 18-215(b). (Of course, at least as to protecting the assets of one series from liabilities of another, this default rule is redundant of the principal rule under Section 18-215(b) that liabilities of a series are enforceable only against assets of that same series. *See supra* note 524.) Often in practice, when the limited liability company agreement is intended to implement the liability limitations under Section 18-215(b), detailed provisions are included in that agreement spelling out not only those limitations but also the recordkeeping and other requirements that must be met to comply with that Section.

⁵²⁶ 6 *Del. C.* § 18-215(b); *see* 6 *Del. C.* § 18-201(a)(3) (“other matters” may be included in the certificate of formation, such as notice of limitation on liabilities of a series); *supra* § 2.02[B], [E].

Section 18-215(b) limits recourse on the obligations of a series to the assets associated with that series. The default rule under that Section also limits recourse on liabilities “existing with respect to the limited liability company generally,” by precluding enforcement of those liabilities against the assets of a series established in accordance with that Section. The notice requirement in Section 18-215(b) pertains, however, only to “notice of the limitation on liabilities of a series.” The statute does not mandate that the certificate of formation must contain any notice of the default limitation on liabilities of

The notice contained in the certificate of formation of the limitation on liabilities of a series under Section 18-215(b) is sufficient for purposes of that Section irrespective of whether the company has established any series at the time that notice is included in the certificate of formation.⁵²⁷ Further, there is no requirement that any specific series of the company must be referenced in the notice.⁵²⁸ The fact that a certificate of formation containing such notice is on file with the Delaware Secretary of State constitutes notice of Section 18-215(b)'s limitation on liabilities of a series.⁵²⁹

In a given case, any challenge to the purported applicability of liability limitations under Section 18-215(b) may be expected to focus initially on technical matters involved in meeting the requirements set forth in that Section (i.e., inclusion of appropriate terms in the limited liability company agreement, recordkeeping that accounts for assets associated with the series, and provision of satisfactory notice in the certificate of formation).⁵³⁰ Compliance with those requirements means, as a legal matter under Delaware law, that the liability limitations under that Section apply to the limited liability company and each series thereof that has been established and conducted according to those rules. Such compliance does not, however, preclude a further challenge to the application of Section 18-215(b) based on equitable grounds. Given the "entity-like" features of a series,⁵³¹ it may be expected that in an appropriate case principles similar to those that justify "piercing the veil" of an entity⁵³² may apply to impress liabilities of a series on members of that series or on holders of limited liability company interests of that series. Likewise, where warranted, equitable principles may apply such that the liability limitations under Section 18-215(b) are disregarded; in that case, depending on the circumstances, assets of a series may be subjected to enforcement of liabilities of other series or of the company

the company generally. Given the default nature of this limitation and its application in concert with the limitation on liabilities of a series, it appears implicit from the statute that the certificate's notice of the limitation on series liabilities is intended also to provide notice of the limitation on liabilities of the company generally.

⁵²⁷ 6 Del. C. § 18-215(b).

⁵²⁸ 6 Del. C. § 18-215(b).

⁵²⁹ 6 Del. C. § 18-215(b); *see* 6 Del. C. § 18-207; *supra* § 2.02[E]; *see also supra* note 526.

⁵³⁰ This assumes there is no dispute as to the choice of law and the application of Delaware law to govern the issue. *See supra* § 5.22[A].

⁵³¹ *See supra* § 5.22[A].

⁵³² *See supra* § 5.03[A][2][c].

generally and general company assets may be made available to satisfy series liabilities.

[C] Classes or Groups Associated with a Series

The limited liability company agreement may establish classes or groups of members or limited liability company interests (or managers) associated with a series.⁵³³ The DLLC Act does not restrict such classes or groups to series invested with liability limitations and protections under Section 18-215(b). These classes or groups have such relative rights, powers, and duties as the limited liability company agreement may provide.⁵³⁴ The limited liability company agreement also may provide for the future creation, in the manner set forth in such agreement, of additional classes or groups, each having such relative rights, powers, and duties as from time to time are established.⁵³⁵ The terms of a later-created class or group may include rights, powers, and duties senior to existing classes and groups of members or limited liability company interests (or managers) associated with the series.⁵³⁶ The explicit statutory authorization for classes or groups within series enhances and expands opportunities for creative structuring of a Delaware limited liability company.

[D] Voting Rights

As is the case generally under the DLLC Act, flexibility abounds in regard to the voting rights and powers that may pertain to a series of members or limited liability company interests or a class or group thereof.⁵³⁷ The limited liability company agreement may provide for the taking of any action without the vote or approval of any member or limited liability company interest, or class or group thereof, associated with a series.⁵³⁸ These actions may include amending the limited liability com-

⁵³³ 6 Del. C. § 18-215(e); *see supra* §§ 5.05, 5.08.

⁵³⁴ 6 Del. C. § 18-215(e).

⁵³⁵ 6 Del. C. § 18-215(e).

⁵³⁶ 6 Del. C. § 18-215(e).

⁵³⁷ *See supra* §§ 5.01[B][3], 5.08[D], 5.10[D]; *infra* § 9.04[A][1].

⁵³⁸ *See* 6 Del. C. § 18-215(e).

pany agreement or creating under the provisions of that agreement a new class or group of the series.⁵³⁹ The limited liability company agreement also may provide that any member or class or group of members associated with a series shall have no voting rights.⁵⁴⁰ Likewise, limited liability company interests of a particular series may be denied voting rights.⁵⁴¹ The limited liability company agreement may grant to all or certain identified members or a specified class or group of the members associated with a series the right to vote separately, or with all or any class or group of the members associated with the series, on any matter.⁵⁴² Voting by members associated with a series may be on a per capita, number, financial interest, class, group, or any other basis.⁵⁴³ Similar flexibility exists insofar as voting rights are incident to a series of limited liability company interests rather than to a series of membership. Under Section 18-215, this flexibility as to voting is available for any series and is not restricted only to series of members or interests that comply with the liability limitation provisions in subsection (b) of that Section.

[E] Management⁵⁴⁴

The DLLC Act's provisions regarding management of a series, in Section 18-215(g), largely parallel the provisions in Section 18-402 regarding management of the company.⁵⁴⁵ Unless otherwise provided in the limited liability company agreement, the management of a series is vested in the members associated with that series, in proportion to the then current percentage or other interest of members in the profits of the series owned by all of the members associated with that series, and the decision of members owning more than 50 percent of such percentage or other interest in the profits is controlling.⁵⁴⁶ The limited liability company agreement, however, may provide for management of a series,

⁵³⁹ See 6 Del. C. § 18-215(e).

⁵⁴⁰ 6 Del. C. § 18-215(e).

⁵⁴¹ See 6 Del. C. § 18-215(e).

⁵⁴² 6 Del. C. § 18-215(f).

⁵⁴³ 6 Del. C. § 18-215(f).

⁵⁴⁴ See *infra* § 9.10.

⁵⁴⁵ See 6 Del. C. § 18-402; *infra* § 9.01[A].

⁵⁴⁶ 6 Del. C. § 18-215(g). The application of this default rule is fairly straightforward when applied in the context of a series of members or a series of limited liability company interests, but more challenging when the series established in or pursuant to the limited liability company agreement is a series of managers.

in whole or in part, by a manager, in which case management of the series is vested in the manager to the extent so provided.⁵⁴⁷ A series of members, limited liability company interests, or assets may have more than one manager, and any such manager is to be chosen in the manner provided in the limited liability company agreement.⁵⁴⁸ A manager of a series holds the offices and has the responsibilities accorded to that person as set forth in the limited liability company agreement.⁵⁴⁹ Subject to Section 18-602 of the DLLC Act (which deals generally with resignation of a manager),⁵⁵⁰ a manager ceases to be a manager with respect to a series as provided in the limited liability company agreement.⁵⁵¹ Except as otherwise provided in the limited liability company agreement, any event under the statute or the limited liability company agreement that causes a manager to cease to be a manager with respect to a series does not, by itself, cause that person to cease to be a manager of the company or of any other series thereof.⁵⁵²

[F] Distributions⁵⁵³

The DLLC Act's treatment of distributions in regard to a series established under Section 18-215(b)⁵⁵⁴ is analogous to its approach to company distributions generally. Section 18-215(i) of the DLLC Act provides that a limited liability company may make a distribution with respect to a series established in accordance with Section 18-215(b) irrespective of Section 18-607(a) of the DLLC Act (which generally limits the ability of a Delaware limited liability company to make distributions prior to its dissolution).⁵⁵⁵ Section 18-215(i), however, prohibits the company from making a distribution with respect to such a series to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the series (subject to specified exceptions) exceed the fair value of the assets associated with that series (subject to

⁵⁴⁷ 6 Del. C. § 18-215(g).

⁵⁴⁸ 6 Del. C. § 18-215(g).

⁵⁴⁹ 6 Del. C. § 18-215(g).

⁵⁵⁰ See *infra* § 9.05[B].

⁵⁵¹ 6 Del. C. § 18-215(g).

⁵⁵² 6 Del. C. § 18-215(g).

⁵⁵³ See also *infra* § 7.01[A][7].

⁵⁵⁴ See *supra* § 5.22[B].

⁵⁵⁵ 6 Del. C. § 18-215(i); see 6 Del. C. § 18-607(a); *infra* § 7.01[A].

specified exceptions).⁵⁵⁶ For purposes of this computation, liabilities of the series do not include liabilities on account of limited liability company interests of or with respect to such series and also do not include liabilities for which the recourse of creditors is limited to specified property of such series; further, while the calculation takes into account the fair value of property of the series that is subject to a liability for which the recourse of creditors is limited, that value is included in the assets associated with that series only to the extent that the fair value of that property exceeds the associated limited recourse liability.⁵⁵⁷ Moreover, for such purposes, a “distribution” does not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.⁵⁵⁸ The limited liability company agreement may provide for the establishment of a record date with respect to allocations and distributions with respect to a series of assets, members, or limited liability company interests (or managers).⁵⁵⁹

A member who receives a distribution in violation of Section 18-215(i), but did not know at the time of the distribution that it violated that provision, is not liable under the DLLC Act for the amount of the distribution.⁵⁶⁰ In contrast, a member who receives a distribution in violation of Section 18-215(i), and who knew at the time of the distribution⁵⁶¹ that the distribution violated that subsection, is liable to the relevant series for the amount of the distribution.⁵⁶² As a practical matter this means that, subject to and in accordance with the DLLC Act and the limited liability company agreement: the limited liability company may enforce a right to return of such assets against the person who received the wrongful distribution; that right of return is an asset associated with the relevant series; and when wrongfully distributed assets are recovered by the company such returned property is again associated with that series. Section 18-607(c) (establishing a three-year statute of limitations regarding liability of a member who receives a distribution)⁵⁶³ is made

⁵⁵⁶ 6 Del. C. § 18-215(i).

⁵⁵⁷ 6 Del. C. § 18-215(i).

⁵⁵⁸ 6 Del. C. § 18-215(i).

⁵⁵⁹ 6 Del. C. § 18-215(h); *see supra* § 5.17; *infra* § 7.04.

⁵⁶⁰ 6 Del. C. § 18-215(i).

⁵⁶¹ *See supra* note 224.

⁵⁶² 6 Del. C. § 18-215(i).

⁵⁶³ *See supra* § 7.05[A].

applicable by Section 18-215(i) to any distribution made with respect to a series.⁵⁶⁴ Subject to Section 18-607(c), Section 18-215(i) does not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.⁵⁶⁵

Under Section 18-215(h) of the DLLC Act, unless otherwise provided in the limited liability company agreement, a member associated with a series established in accordance with Section 18-215(b), who has become entitled to receive a distribution with respect to such series, has the status of, and is entitled to all remedies available to, a creditor of the series, with respect to that distribution.⁵⁶⁶ This rule is subject to Section 18-215(i) (limiting distributions the company may make with respect to a series) and Section 18-215(l) (regulating distribution of series assets during the winding up of a series), and it applies notwithstanding Section 18-606 of the DLLC Act, which establishes its own default rule conferring creditor status on a member who becomes entitled to receive a distribution from the company, such member thereby becoming a creditor of the limited liability company generally with respect to such distribution.⁵⁶⁷ The clear implication here is that a person's entitlement to receive a distribution in regard to a series established under Section 18-215(b) does not render that person a creditor of the company generally.

[G] End of Member's Association with a Series

Section 18-215(j) of the DLLC Act establishes two rules dealing with the dissociation of a member from a series, each of which may be modified by the limited liability company agreement. The first of these default rules provides that a member ceases to be associated with a series, and loses the power to exercise any rights or powers of a member with respect to such series, upon the assignment of all of such member's limited liability company interest with respect to that series.⁵⁶⁸ The second default rule under Section 18-215(j) provides, however, that such an assignment, indeed any event under the DLLC Act or the limited liability company agreement that ends a member's association with a series, does not, in itself, cause that member to cease to be associated

⁵⁶⁴ 6 Del. C. § 18-215(i).

⁵⁶⁵ 6 Del. C. § 18-215(i); *see infra* §§ 7.01[C], 15.02.

⁵⁶⁶ 6 Del. C. § 18-215(h).

⁵⁶⁷ 6 Del. C. § 18-215(h); *see* 6 Del. C. § 18-606; *supra* § 5.08[C]; *infra* § 7.02[F].

⁵⁶⁸ 6 Del. C. § 18-215(j).

with any other series, terminate the continued membership of such person in the limited liability company, or terminate the series.⁵⁶⁹ This latter rule applies regardless of whether such member was the last remaining member associated with the series.⁵⁷⁰

This default principle (that the loss of the last remaining member associated with a series does not terminate that series) highlights an important distinction between a series and a limited liability company. The company faces dissolution whenever it has no member.⁵⁷¹ A series, in contrast, does not depend for its existence on a member being associated with the series. As a consequence, the DLLC Act need not and does not contain “savings” provisions of the type that enable avoidance of dissolution of the limited liability company for lack of a member.⁵⁷²

[H] Termination of a Series

Subject to Section 18-801 of the DLLC Act (which establishes events causing dissolution of a Delaware limited liability company)⁵⁷³ and except to the extent otherwise provided in the limited liability company agreement, a series may be terminated and its affairs wound up without causing the dissolution of the limited liability company.⁵⁷⁴ The termination of a series does not affect any limitation on liabilities of a series provided by Section 18-215(b).⁵⁷⁵ A series is terminated upon the dissolution of the limited liability company under Section 18-801 or otherwise upon the first to occur of the following:

1. The time specified in the limited liability company agreement;
2. The occurrence of events specified in the limited liability company agreement;
3. Unless otherwise provided in the limited liability company agreement, the affirmative vote or written consent of the members of the company associated with the series or, if there

⁵⁶⁹ 6 Del. C. § 18-215(j).

⁵⁷⁰ 6 Del. C. § 18-215(j).

⁵⁷¹ 6 Del. C. § 18-801(a)(4); *see infra* § 16.02[D].

⁵⁷² *See* 6 Del. C. § 18-801(a)(4) (allowing for continuation of the limited liability company without dissolution following a time when the company has no member); *infra* § 16.02[D][1].

⁵⁷³ *See infra* § 16.02.

⁵⁷⁴ 6 Del. C. § 18-215(k).

⁵⁷⁵ 6 Del. C. § 18-215(k); *see supra* § 5.22[B].

is more than one class or group of members associated with the series, then by each such class or group, in either case, by members associated with such series who own more than two-thirds of the then current percentage or other interest in the profits of such series owned by all of the members associated with such series or, as appropriate, owned by the members in such class or group; or

4. The termination of such series under Section 18-215(m).⁵⁷⁶

The DLLC Act does not provide expressly for the revocation of the termination of a series.⁵⁷⁷ It may be possible, however, depending on the terms of the limited liability company agreement, to achieve the practical equivalent of such a revocation through appropriate management of the process of winding up the terminated series.

[II] Winding up a Series

The DLLC Act's provisions for the winding up of a terminated series of a Delaware limited liability company largely reflect the statute's approach to winding up a dissolved company.⁵⁷⁸ As a default rule under the DLLC Act, a manager associated with a series who has not wrongfully terminated the series or, if there is no such manager, then the members associated with the series, or a person properly approved by those members, may wind up the affairs of the series.⁵⁷⁹ A person winding up a series by authority of its members must be approved by the members associated with the series or, if there is more than one class or group of those members, then by each such class or group, in either case, by members who own more than 50 percent of the then current percentage or other interest in the profits of the series owned by all of the members associated with the series or by the members in such class or group

⁵⁷⁶ 6 *Del. C.* § 18-215(k)(1)-(4). Under Section 18-215(m), on application by or for a member or manager associated with a series established in accordance with Section 18-215(b), the Delaware Court of Chancery may decree termination of the series whenever it is not reasonably practicable to carry on the business of that series in conformity with the limited liability company agreement. 6 *Del. C.* § 18-215(m).

⁵⁷⁷ *Cf.* 6 *Del. C.* § 18-806 (revocation of dissolution of a Delaware limited liability company); *see infra* § 16.04[C].

⁵⁷⁸ *See infra* § 16.06.

⁵⁷⁹ 6 *Del. C.* § 18-215(l).

associated with the series, as appropriate.⁵⁸⁰ The foregoing provisions regarding the winding up of a series are stated in Section 18-215(1), and pursuant to that subsection they apply notwithstanding Section 18-803(a) of the DLLC Act.⁵⁸¹

Section 18-215(1) generally is not limited in its application to a series established under Section 18-215(b). The “winding up” of a series that is not characterized by the liability limitation features under Section 18-215(b), however, seems somewhat anomalous. Section 18-215(1) should be interpreted to apply particularly to a series established under Section 18-215(b) alone.

In any event, Section 18-215(1) does specifically state that if a series has been established in accordance with Section 18-215(b), the Delaware Court of Chancery may wind up the affairs of that series for cause shown upon application of any member associated with the series or such member’s personal representative or assignee, and in connection therewith, may appoint a liquidating trustee.⁵⁸² The persons winding up the affairs of a series may, in the name of the limited liability company and for and on behalf of the company and such series, take all actions with respect to the series as are permitted under Section 18-803(b).⁵⁸³ The persons winding up the affairs of a series must provide for the claims and obligations of the series and distribute the assets of the series as provided in Section 18-804 of the DLLC Act.⁵⁸⁴ Actions taken in accordance with Section 18-215(1) do not affect the liability of members and do not impose liability on a liquidating trustee.⁵⁸⁵

[J] Foreign Series Limited Liability Company

A limited liability company formed under the laws of a jurisdiction other than Delaware may be governed by a limited liability company agreement that establishes or provides for the establishment of designated series of members, managers, or limited liability company interests

⁵⁸⁰ 6 *Del. C.* § 18-215(1).

⁵⁸¹ 6 *Del. C.* § 18-215(1).

⁵⁸² 6 *Del. C.* § 18-215(1).

⁵⁸³ 6 *Del. C.* § 18-215(1); *see* 6 *Del. C.* § 18-803(b); *infra* § 16.06[D].

⁵⁸⁴ 6 *Del. C.* § 18-215(1). Section 18-215(1) by its terms makes Section 18-804 applicable to the winding up and distribution of assets of a series. 6 *Del. C.* § 18-215(1); *see* 6 *Del. C.* § 18-804; *infra* § 16.06[E].

⁵⁸⁵ 6 *Del. C.* § 18-215(1); *see infra* § 16.06[F].

having separate rights, powers, or duties with respect to specified property or obligations of that company or profits and losses associated with specified property or obligations. If such a company is registering to do business in the State of Delaware in accordance with Section 18-902 of the DLLC Act, the fact that it is governed by such an agreement must be stated on its application for registration as a foreign limited liability company.⁵⁸⁶ That foreign limited liability company also must state on the application whether the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series, if any, are enforceable against the assets of such series only, and not against the assets of the company generally or any other series thereof, and whether any of the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to the foreign limited liability company generally or any other series thereof are enforceable against the assets of such series.⁵⁸⁷

⁵⁸⁶ 6 Del. C. § 18-215(n).

⁵⁸⁷ 6 Del. C. § 18-215(n). Although the language of Section 18-215(n) may appear somewhat ambiguous in this regard, it is intended simply to set forth a required statement to be included in the foreign limited liability company's application for registration and, consistent with the statute's treatment of foreign limited liability companies generally, *see* 6 Del. C. § 18-901(a), is not intended to establish a substantive prerequisite to registration or a substantive rule as to the treatment of liabilities of such limited liability company of any series thereof. *See infra* §§ 18.02, 18.03[B][1][a].