



LEGAL NOTES

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THE SERIES LLC: STREAMLINING YOUR REAL ESTATE INVESTMENTS AND OTHER MULTI-ENTITY COMPANIES

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Over the past fifteen years, the Limited Liability Company has become a wildly popular form of business entity, and for good reason. Prior to its creation, business owners only had two basic options: a partnership or a Subchapter S Corporation (“S-Corp”).

The partnership gives its partners a great deal of flexibility, but offers no shield against personal liability (except in limited circumstances beyond the scope of this article). That is, the partners could each be sued individually for the activities of the partnership, exposing their personal assets (home, savings accounts, etc.) to creditors of the partnership. In short, a partner could be left personally destitute because of a business activity. Alternatively, the S-Corp offers its owners protection against personal liability, but the IRS has strict rules for S-Corps. These rules significantly reduce the S-Corps’ flexibility.

In the early 1990’s, a new form of entity emerged: the Limited Liability Company (“LLC”). The LLC offers the best of both worlds: the flexibility of a partnership and the limited liability of an S-Corp. Since the late 1990’s, when LLC legislation was enacted in all states, the LLC has become the entity of choice for most small businesses.

In the context of real estate investments, it is now almost universally accepted among businesspeople and attorneys that each parcel of real estate should be held by a separate LLC. That structure allows each parcel of land to be “shielded” from the LLC Member’s other parcels. If someone were to slip and fall on one property, they can only successfully sue the LLC which owns that particular property. If the same entity held many properties, all those properties would be exposed to that lawsuit.

While the benefit of the multiple-LLC strategy is clear, the transactional costs can add up. Each LLC needs, at a minimum:

1. Articles of Organization filed with the state;
2. An Operating Agreement;
3. Annual registration fees paid to the state; and
4. Its own income tax return.

Each of these requirements can add costs for the business owner. These transactional costs may seem like overkill for certain ventures, such as real estate investments, in which the members desire liability protection but do not wish to be burdened with a lot of red tape or an involved organizational structure.

The State of Delaware, always a pioneer in corporate law, answered that technical vs. practical dissonance with the “series” LLC. Other states, including Illinois and Nevada, have followed suit. This type of LLC is permitted to contain individual series (or sometimes also called “cells”) which do not have the full rights of a business entity, but which can own assets and, most importantly, have liability shields between each other.

For example, the owner of rental properties can set up a single Delaware Series LLC; let’s call it “Smith Properties, LLC”. The LLC would contain multiple individual series which would own a separate property (i.e., “Smith Properties, LLC, 123 Fake St. Series”, “Smith Properties, LLC, 456 Fiction Ave. Series”, and so on). If someone slipped and fell on 123 Fake St., the property at 456 Fiction Ave. would not be exposed to a lawsuit. Both properties are owned by the same LLC, albeit by separate series within that LLC, and therefore have liability shields between them.

Because there is only one LLC, items (1) – (3) above would not need to be repeated for each individual series. However, the IRS has proposed regulations that state that a series may have to file its own income tax return. This is because most of the series LLC laws of the applicable states allow an individual series to have significantly different owners and activities than each other series and the main LLC. The IRS is therefore concerned with individuals abusing the entity form to avoid taxation. However, multiple returns may still be avoided if the series otherwise qualify for consolidated filing.

All things being equal, a business structure that involves one or a low number of series LLCs is a substantial improvement—administratively and financially—on the multiple-entity business structure that has dominated real estate investment firms and similar businesses that (until now) required segregated entities. And, because it is a relatively new concept, the series LLC is not widely known. Many business owners may wish to consider adopting such a structure.

***OFFICE OF COURT ADMINISTRATION’S
“AFFIRMATION RULE” IN FORECLOSURE
FILES HELD INVALID BY ONE COURT***

By Carol C. Pierce, J.D.

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As a result of the “Great Recession” of 2009-2010, courts in New York and around the country have been inundated with residential foreclosure actions. In connection with many of these foreclosure filings, however, courts are also finding that there have been widespread improprieties in connection with these filing by the plaintiffs, who are typically mortgage lenders. The most common improprieties include (i) failure to review the documents, (ii) failure to establish standing to commence the action, (iii) the filing of notarized affidavits which falsely attested to review critical facts in the file, and (iv) “robo-signatures” of documents.

In response to this growing problem, on October 20, 2010, the Hon. Jonathan Lippman, Chief Judge of the New York Court of Appeals, announced the promulgation of Administrative Order #548-10, otherwise referred to as “the affirmation rule,” in all foreclosure actions on residential properties. This rule requires that the Plaintiff’s papers include an affirmation by the

Plaintiff's lawyer attesting to the paper's integrity.

The rule was designed to put a halt to the filing of improperly documented foreclosure actions by requiring the plaintiff's attorney to review the papers prior to filing to verify that not only are the documents in order, but also that the plaintiff has standing to commence the foreclosure action. The result of this affirmation rule not only dramatically reduced the number of foreclosure filings, but also halted the prosecution of certain pending foreclosures.

As well intentioned as the affirmation rule may be, at least one New York court has held that Judge Lipmman exceeded his authority in enacting the rule. In February 2011, the court in *LaSalle Bank, N.A. v. Pace*, determined that Administrative Order #548-10 did not constitute a permissible exercise of the rule making authority vested with the Chief Administrator of the Courts. *See LaSalle Bank, N.A.v. Pace*, 919 N.Y.S. 2d 794 (Suffolk County, 2011). Under Article VI, §28; Judiciary Law §211 and §212, the Chief Judge is vested with the authority to establish "standards and administrative policies relating to ... the adoption, amendment, rescission, and implementation of rules and orders regulating practice and procedure in the courts subject to the reserved power of the legislature provided for in section thirty of article six of the constitution." *Judiciary Law §211(1)(b)*. Under Judiciary Law §212(1), the role of the Chief Administrator is to supervise the administration of the Unified Court System throughout the state. Additionally, under 22 NYCRR §80.1(b)(6), the delegated powers of the chief administrator includes "the power to adopt administrative rules for the efficient and orderly transaction of business in the trial courts, including, but not limited to, calendar practice, in consultation with the administrative board of the courts or the appropriate appellate divisions." 22 NYCRR §80.1(b)(6).

While the authority empowered to the Chief Judge under the New York Constitution, the

Judiciary Law, and the promulgating regulations is viewed as very broad with respect to the implementation of the practice and procedure of the courts statewide, the question posed in the *LaSalle* case was whether the affirmation rule was a permissible exercise of administrative power regarding the operation of the courts, or if the rule in fact constituted an impermissible exercise of legislative power. The court in *LaSalle* determined that Judge Lippman's issuance of the affirmation rule constituted an unauthorized use of legislative power.

Even if the affirmation rule is determined to be a legislative power, is it really that invasive? The intended purpose of the rule was to reduce improper and false foreclosure filings, which not only clog the court system, but result in individuals losing their homes without proper proof. As such, the rule simply requires the plaintiff's attorney to review papers in advance of filing them with the court. As a matter of practice, this should be done by every Plaintiff's attorney on any case, regardless of whether or not it is a foreclosure matter.

It is almost certain that the Court of Appeals will weigh-in on this issue in the future.

BSRB WELCOMES NEW ATTORNEYS

By Michael S. Blustein, J.D.

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As Managing Partner of Blustein, Shapiro, Rich & Barone, LLP, it is my privilege to announce that we have enhanced our ability to serve our clients by adding three outstanding attorneys to our ranks.

We have greatly expanded our capabilities in the commercial litigation department. *David S. Ritter*, recently retired as Justice of the New York State Appellate Division Second Department, has joined the firm in an Of Counsel capacity. A graduate of Cornell Law

School, Judge Ritter brings his wealth of knowledge and experience as a mentor to the attorneys in our commercial litigation department, and will be offering his services to the community as a mediator and/or arbitrator. The intangibles he offers as an advisor with his experience as both a trial and appellate Justice are immeasurable, and Judge Ritter provides our attorneys with that extra edge when they represent our clients at trial.

Jamie T. Ferrara joins the firm as an associate attorney in our commercial litigation department. A graduate of Albany Law School, Jamie brings five years of trial experience as an Assistant District Attorney with the Orange County District Attorney's Office. As an ADA, Jamie successfully tried a manslaughter case to verdict and gained investigative skills as a white collar crime prosecutor. Using those skills, he will enhance our already strong commercial litigation team, all of whom have extensive trial experience.

Austin F. Dubois, joins our ranks as an associate attorney in our estate planning, elder law and estate administration department. As a fifth generation Orange County resident, Austin has extensive contacts in the community. Austin earned his Juris Doctorate at Rutgers University School of Law at Camden, and recently received his Masters in Tax Law from Temple University Law School. Austin's expertise in tax law enhances our capabilities in that practice area.

All three of these attorneys were raised in Orange County and chose to continue their careers at Blustein, Shapiro, Rich & Barone, LLP. We are excited to have added three home-grown attorneys who are committed to helping building the best general practice law firm in Orange County.

EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

June 16, 2011 and July 14, 2011 (3:00 p.m. to 6:00 p.m.)

Long-Term Care and Medicaid Planning

June 26, 2011 (4:00 p.m. to 6:00 p.m.)

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.

The information in this newsletter is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.