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## Is anyone following the "serial captive" format in Delaware? If so, any comment as to why that form of captive format would afford more flexibility than a PCC?

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[Chris Kramer](#), [Michael Mead](#) like this

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[Marla Norton](#) • Hi Chris,

A traditional protected cell captive (or a sponsored captive in Delaware) is formed under insurance laws that permit the segregation of assets and liabilities into separate cells, but there is always the concern whether the firewalls will be respected outside the scope of the insurance regulatory arena. The so-called "serial captive" structure takes advantage of the flexibility of the Delaware captive statute, which is not a formation statute. Rather, it allows the use of any Delaware or foreign entity, including a Delaware "series LLC" or "series LP" or "series statutory trust". For example, Delaware's LLC Act (6 Del. C. Section 18-215) provides that a limited liability company may have separate series of assets, interests or members and, if a notice of limitation on interseries liabilities is provided in the certificate of formation for the LLC, the assets of each series will be subject only to the debts, obligations and liabilities associated with that series and will be insulated from the debts, obligations and liabilities of all other series. Each series can have separate assets, separate owners, can contract and incur debt in its name, can grant liens and security interests, can sue and be sued, so long as the assets and liabilities are properly accounted for. So by combining the two concepts, you end up with a captive in which the separateness of the "cells" should be respected both from an insurance regulatory perspective and in a court of law or equity, provided that you mind your p's and q's.

I would be happy to discuss this offline in greater detail. There are many ways to use this flexibility to provide greater assurance without incurring the costs of forming a family of captives. A captive can issue different lines from different series, can have different participants in different series, or can structure different series to make separate tax elections, for instance.

Please note that this post does not constitute legal advice and does not create an attorney-client relationship.

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[Jeffrey Simpson](#) • Chris:

I co-wrote an article on this topic that appeared in the April issue of Captive Review. I'd be happy to share it with anyone interested. I advised on one of the two that have been licensed, and I'm working on several others in various stages of formation.

The series captive in Delaware is so suddenly popular, I believe, because it brings practical advantages in both flexibility and efficiency. Marla's comment nicely lays out some of the attractions of the series LLC (and other series entity forms) in Delaware and the distinction of Delaware's captive statute as a licensing statute. But there's more from the entity perspective, the captive statute perspective and the application perspective.

From the entity perspective, the series LLC (the licensed serial captives in Delaware have both been LLCs) offers extraordinary flexibility in governance. An important highlight of the Delaware LLC Act is that fiduciary duties can be limited or altogether eliminated, a very attractive feature for many of the types of transactions that flow through captives.

From the captive statute perspective, the series LLC in Delaware offers numerous efficiencies. It can be licensed as a special purpose captive rather than a sponsored captive (Delaware's name for PCCs), thereby reducing the minimum capital and surplus requirement from \$500,000 to \$250,000. Also, whereas each cell of a Delaware sponsored captive would be subject to the state's \$5,000 minimum premium tax, the series of a series LLC licensed as a special purpose captive are not subject to individual taxation. Instead, the series LLC is subject to an aggregate tax, and there are circumstances where premium between series may be excluded from the premium tax calculation. So, there is opportunity for remarkable premium tax efficiency.

From the application perspective, this structure has already proven attractive to closely held companies that form related party series for a variety of purposes, including traditional P&C coverages and tax advantaged planning. There is also quite a bit of interest in series LLCs among the employee benefits community.

Obviously, this is just a superficial explanation of some of the highlights. There is much more to cover, and everything depends on the particular facts and circumstances of each unique case. I'd be happy to discuss further.

Jeff

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[Chris Kramer](#) • Marla,

Thanks for the excellent summary.

What I get out of your comment is: "So by combining the two concepts, you end up with a captive in

which the separateness of the "cells" should be respected both from an insurance regulatory perspective and in a court of law or equity..."

Question: What is the main difference between the "incorporated cell" and the DE "series LLC"?

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[Follow Marla](#)

[Marla Norton](#) • Hi Chris,

As I understand the "incorporated cell" format, it involves forming a number of separate legal entities under a regulatory scheme that permits them to be treated as a single organization for certain purposes, including capital and surplus requirements. That sort of an arrangement implies duplication of formation and maintenance costs. An incorporated cell structure thus may provide equal or perhaps even greater certainty, but requires more work and cost to set up and maintain separate legal entities. Technically, while having the many attributes of separate legal entities, series are NOT separate legal entities. Thus they can be formed by private ordering and without a separate public filing. With a series structure (using an LLC as an example), depending upon the needs of the parties, you can draft a single LLC Agreement, and append a schedule or a supplement for each series, identifying how that series differs from the basic structure set up in the agreement (identifying the assets and lines of business included in that series, different managers (if any) or management features, the members associated with the series and any additional details pertaining to the operation of the series). Depending upon the plan of operation that is approved by the DOI, you may not need a separate regulatory filing when a series is created as contemplated and described (with sufficient specificity of terms) in the plan of operation. But there is no need to form a new entity, appoint a new registered agent, pay additional fees and if the members and managers are to be the same, no need to change these features. We in Delaware looked at the incorporated cell structure to determine whether we should advocate for a change in the DE captive statute to permit this, but we concluded that (1) it offered no real benefit that could not be achieved using a series structure and a properly drafted plan of operation, and (2) if an applicant wanted a structure that utilized a family of captives but wanted them regulated as a single enterprise, the DE captive statute is flexible enough to permit the DOI to approve such a structure. I believe Delaware has licensed one or two such "families" of captives.

As Jeff notes, by using Delaware LLCs or LPs (with or without the series provisions), you can limit or eliminate fiduciary duties (up to but excluding the implied contractual covenant of good faith and fair dealing). This benefit is available for a "family" of captives as well if licensed under the Delaware Act using Delaware LLCs. From what we are seeing here in Delaware, the current Commissioner and her staff are continuing the consultative approach adopted by the prior administration, so the flexibility inherent in the Delaware captive statute, paired with the flexibility of the Delaware entity laws, should provide for the development of new structures and new ideas.

I hope you feel that this response has addressed your questions. Again, should you have further questions, I would be happy to discuss these (or other) issues with you in greater detail

Regards, Marla

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**[Martin Eveleigh](#)** • Both Marla and Jeff make some very interesting points and I, for one, shall want to look more closely at the benefits of a Series LLC. I do think it worth pointing out, however, that Marla's opening statement that "A traditional protected cell captive (or a sponsored captive in Delaware) is formed under insurance laws that permit the segregation of assets and liabilities into separate cells" is by no means always true. Indeed, when Guernsey first introduced the PCC concept, it was through specific legislation, the Protected Cell Companies Ordinance 1997. Other jurisdictions followed suit with amendments to their Companies laws. They include, Cayman Islands, Bermuda, Barbados and Anguilla. The BVI did, initially use its Insurance legislation rather than amendments to its Companies laws to introduce cells but the enabling legislation in BVI is now the BVI Business Companies Act and not the Insurance Act. So, in many jurisdictions, perhaps especially outside the United States, the cell company concept is seen as having an application beyond captive insurance companies and this wider application is specifically catered for by legislation.

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**[Dick Goff](#)** • While I may be accused of oversimplification, the only true difference other the domicile between a Serial LLC Captive and an ICC is the governing domicile's premium tax allocation.

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**[Nick Morgan](#)** • To read the article we published in Captive Review's April Edition, Co-Authored by Jeff Simpson and Randie Beckie (see Jeff Simpson comment above) please email me and I will forward a PDF copy.

n.morgan@captive-review.com

Unfortunately it is too long to publish in this Comment Box as it runs over three pages.

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**Michael Mead** • It would seem to me that much of the description by Jeff and Marla center on a court's acceptance of the sanctity of the structure. I am not aware of a case and would hesitate to volunteer a client as the guinea pig. Nonetheless it seems an intriguing concept. I am familiar with serial LLCs in estate planning and asset protection work. The DE licensing approach may offer value but it's true value awaits adjudication.

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**Andy McComb** • I concur with Martin's comments that if the major differentiating factor is support of the cell structure by the courts then I would much prefer to use a "traditional" cell company established under general companies legislation in a legal jurisdiction with some historical experience of adjudicating on cell legal issues than a new structure yet to be widely accepted. While the case law support for cell companies is still somewhat limited it is starting to develop and we have seen support in the offshore home domiciles as well as onshore US court support for the sanctity of cells created under specific legislation enabled in credible offshore jurisdictions. There is always less risk working with a tried and tested structure. The cell concept was first introduced in Bermuda by way of private legislation over 25 years ago and has been replicated and developed by most other jurisdictions over time including many onshore US states. This enhances its credibility with the courts.

The other possible advantage raised earlier that concerns me with the LLC series and ICCs is the possibility of eliminating fiduciary responsibility or devolving corporate governance on a cell by cell basis. From an insurance regulatory perspective this would be a negative as many regulators rely on experienced cell company owners and the "main" Board to ensure the operational integrity of all cells is maintained and often place a "watchdog" reporting responsibility on the "main" Board.

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**Jeffrey Simpson** • Thanks, everyone, for your feedback. It's helping us to see where we Delawareans need to be more clear in explaining this structure to maximize understanding of the opportunity. I'll try to make a few clarifications without going on too long.

My personal belief is that the possibility that courts will respect the series is among the least material

reasons to utilize a series LLC instead of another form of PCC. Practically speaking, there may be reasons to have confidence in the viability of series, but there really seems to me to be no more or less certainty that the series of a Delaware series LLC will be respected than there is that the cells of any protected cell company will be respected. As Martin and Andy suggest, evidence is building that cell structures (whether PCC or series entities) will be respected. But as Mike Mead points out, nobody really knows. Like some of the offshore jurisdictions, comfort can be taken in the knowledge that the Delaware series LLC first evolved outside of the insurance context and continues to have non-insurance uses (particularly in the mutual fund industry).

As Dick points out, a big benefit of the series LLC is the potential for premium tax efficiencies. But I would disagree that this is the only true difference between a series LLC and an ICC. The ICC format necessarily includes the additional frictional costs and administrative burdens required to respect the formalities of each separate company. The serial format reduces or eliminates those costs and burdens. Also, corporate entities have rigid governance rules not necessarily applicable to LLCs.

The options for creating flexible governance structures in series LLCs, which are too great to discuss in detail here, are extremely valuable. One key option, though, is the opportunity to reduce or eliminate fiduciary duties. This does not mean that the main board would not have its traditional watchdog role. Indeed, that role is important to both the regulators and the participants. Instead, reduction or elimination of fiduciary duties can protect directors (or managers as they are generally labelled in LLCs) and officers from unintended personal liability. Any transaction that connects true third parties, such as unrelated participants in different cells of the same captive, or that involves self-dealing, such as a captive sponsor also providing services to the captive, is a potential source of a fiduciary duty issue and risk to the directors and officers. Delaware LLCs permit management of these kinds of risks in a way that no other entity does.

I hope these comments are helpful. I'm happy to continue this discussion here or in another forum.

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**[Rolland "Chip" Bates III](#)** • Jeffery, I think you nailed it as far as I am concerned. These were very important points that added value to our formation of Amplitude Re Co of Delaware LLC that were brought out by our local council. There are many interesting aspects of this structure which dovetailed our business plan like no other. This is a very nice discussion that would of been helpfull early on and should be beneficial to all, thanks.

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**Thomas Cifelli** • There is impressive expertise shared here. You might want to also take a peek at this article: [http://captiveexperts.com/Series\\_LLC\\_Captives.html](http://captiveexperts.com/Series_LLC_Captives.html) despite it in need of some updating considering some of the above comments.