THE RELATIONSHIP OF THE MODEL BUSINESS CORPORATION ACT TO OTHER ENTITY LAWS

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For several decades after the Model Business Corporation Act (MBCA) was first prepared in 1950,[1] the business corporation was the entity of choice for organizing a business. That is now often not the case, and the competition from other entity forms raises important questions about the future development of the MBCA.

I

THE PREEMINENCE OF THE CORPORATE FORM FROM 1950 THROUGH THE 1980S

For much of American history, starting a business involved forming either a partnership or a corporation.[2] Originally, partnerships were what is known today as "general partnerships," but toward the end of the nineteenth century, the limited-partnership form was created.[3] The choice between the corporation and partnership forms was driven by two main concerns: liability and taxation.[4] Whereas a partnership left its owners vulnerable to personal liability for the obligations of the business, a corporation protected the owners by limiting liability to just the assets of the business.[5] On the other hand, the federal

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1. *See* Comm. on Bus. Corps., *Model Business Corporation Act*, 6 BUS. LAW. 1 (1950).

2. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 465 (2010). The other option for conducting a business, of course, was the sole proprietorship. Sole proprietorships suffer from the same lack of a limitation on personal liability as general partnerships and consequently, have never been used to conduct a business of any significant size.

3. D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES 137 (1st ed. 2004).

4. *See, e.g.*, UNIF. LTD. LIAB. CO. ACT prefatory note (1996); SMITH & WILLIAMS, *supra* note 3, at 128; Daniel S. Kleinberger, *Two Decades of "Alternative Entities": From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 447–56 (2009).

5. This distinction remains a central part of entity law. *Compare* UNIF. P'SHIP ACT § 306 (1997), *with* MODEL BUS. CORP. ACT § 6.22 (2002).

government taxed a corporation on both its profits and any payout to shareholders, referred to as "double taxation"; but only taxed the profits of a partnership as income to the partners, referred to as "flow-through" or "partnership" taxation.[6]

Early efforts to resolve the tension between liability and taxation concerns included the development of the limited partnership and the S-corporation, but each was an imperfect solution. The limited partnership provided flow-through taxation, but did not completely solve the liability problem; the S-corporation provided a full liability shield, but did not provide the best tax rules. So long as a limited partnership had at least one general partner that was liable for the obligations of the business, the remaining partners could be "limited" partners whose liability was limited to their investment in the organization.[7] The limited partners were relegated to the status of passive investors: if they participated in control or management, they could lose their liability shield.[8] The general partner was also required to be adequately capitalized so that there were substantial assets of at least one partner at risk for the liabilities of the business.[9] In contrast to limited partnerships, an "S-corporation" or "small-business corporation" provides the full corporate-liability shield, but only some of the benefits of flow-through taxation. Although the corporation is not subject to tax on its earnings,[10] there are significant restraints on both the ownership structure of S-corporations and the types of businesses that may qualify for S-corporation status.[11]

The tension between seeking full limited liability and flow-through taxation was generally resolved by choosing the corporate form and seeking to qualify as an S-corporation if possible. Thus, in states that enacted the MBCA, it was the most used of the state's entity laws from 1950 through approximately 1990. But all that was to change with the development of limited-liability companies.

II

THE ASCENDANCY OF LLCS

In 1977, Wyoming enacted the first statute authorizing the organization of limited-liability companies. The Wyoming statute was designed to create an entity with limited liability that would also be subject to flow-through taxation under the regulations of the Internal Revenue Service, known as the *Kintner*

6. *Compare* I.R.C. § 11 (2009) (corporate tax liability), *with id.* § 701 (partnership tax liability).

7. SMITH & WILLIAMS, *supra* note 3, at 138.

8. *Id.* The "control rule" in the Revised Uniform Limited Partnership Act was adopted by forty-nine states. *Id.* Later, Georgia and Pennsylvania eliminated the possibility of liability for limited partners, even if they did participate in the control of the business. The most recent Uniform Limited Partnership Act has followed suit, reflecting the trend toward limited liability in entity law. *See* GA. CODE ANN. § 14-9-303 (2010); 15 PA. CONS. STAT. § 8523 (2010); UNIF. LTD. P'SHIP ACT § 303 (2001).

9. *See* Kleinberger, *supra* note 4, at 449.

10. *See generally* I.R.C. §§ 1361–1379 (2006).

11. *Id.*; *see also* Kleinberger, *supra* note 4, at 449–50 (discussing briefly the restraints imposed on S-corporations).

regulations, which provided that an entity could be taxed as a corporation if it had a preponderance of corporate characteristics.[12] These characteristics were (1) continuity of life, (2) centralization of management, (3) limited liability, and (4) free transferability of interests.[13] The Wyoming statute provided for limited liability and also provided default rules on the other factors that would result in partnership taxation.[14]

A decade after the enactment of the Wyoming statute, the IRS finally acknowledged that a Wyoming LLC qualified for flow-through taxation.[15] States that passed LLC statutes soon thereafter modeled those statutes on the Wyoming law.[16] Then, in 1997, the Treasury Department rendered the *Kintner* regulations obsolete when it adopted the "check the box" regulations, under which an unincorporated organization with two or more owners was taxed as a partnership by default, unless the business elected to be taxed as a corporation by "checking the box."[17] The adoption of the check-the-box regulations is important not just because it confirmed the favorable tax treatment of LLCs, but also because it represents the final resolution of the tension between the desires for limited liability and flow-through taxation. In an LLC, all of the owners may have full limited liability, and the entity may simultaneously be taxed as a partnership.

In addition to resolving the tension between the availability of flow-through taxation and providing a full liability shield, LLCs have become the entity of choice because of the freedom of contract they provide when organizing a business. The comment to section 110 of the recently completed revision of the Uniform Limited Liability Company Act (ULLCA), which was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2006, notes that the scope of a limited-liability company's operating agreement "includes all matters constituting 'internal affairs.'"[18] The original ULLCA, adopted in 1996 and still the law in a handful of states, similarly provides that "an operating agreement may modify or eliminate any rule specified in any section of this Act except [for certain specific matters]."[19] Indeed, the comment

12. The adoption of the regulations was provoked by the decision in *United States v. Kintner*, 216 F.2d 418, 422 (9th Cir. 1954). These factors trace their efficacy to *Morrisey v. Commissioner*, 296 U.S. 344 (1935) (setting forth six factors determining whether an entity was to be taxed as a corporation under the Internal Revenue Code). For a more detailed description of how the law on federal tax classification of business entities developed, see Armando Gomez, *Rationalizing the Taxation of Business Entities*, 49 TAX LAW. 285 (1996).

13. Treas. Reg. § 301.7701-2 (1960).

14. WYO. STAT. ANN. §§ 17-15-101 to -130 (1977).

15. Rev. Rul. 88-76, 1988-2 C.B. 360.

16. In order to provide limited liability and also satisfy the *Kintner* requirements, however, Wyoming and the states that followed its lead created LLCs that lacked other favorable corporate characteristics, such as continuity of life, which resulted in the company's dissolution when any member dissociated. Kleinberger, *supra* note 4, at 452–53.

17. Treas. Reg. § 301.7701-3 (as amended by T.D. 8697, 1997-1 C.B. 215).

18. UNIF. LTD. LIAB. CO. ACT § 110 cmt. (2006).

19. *Id.* § 103 cmt. (1996).

to section 110 of the 2006 ULLCA recognizes that a "limited liability company is as much a creature of contract as of statute."[20]

Similarly, the Delaware Limited Liability Company Act[21] enshrines the principle of freedom of contract with its statement that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."[22] This principle extends to all aspects of the LLC, including the fiduciary duties of its members.[23] Indeed, the Delaware legislature formally acknowledged this when it added to the Delaware statute a provision that

> [t]o the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted *or eliminated* by provisions in the limited liability company agreement.[24]

The LLC, unlike the corporate statute, thus extends private ordering to defining baseline fiduciary obligations among members as well as member–manager relations.

Because LLCs resolve the tension between the availability of partnership taxation and a full liability shield, and because they also provide maximum freedom of contract to order their internal affairs, LLCs have become the most popular choice for the formation of a new entity today.[25] A recent study showed that 2007 filings for new LLCs outpaced corporations, the closest competitor, by a rate of almost two-to-one.[26] The rate of LLC formations compared to the formation of other entities has increased every year since 1977,[27] and there is nothing to suggest that that trend will not continue. The exception to this trend is publicly traded entities, which continue to be organized as corporations.[28]

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20. *Id.* § 110 cmt. (2006).

21. Ch. 434, 68 Del. Laws 1329 (1992) (codified as amended at DEL. CODE ANN. tit. 6, ch. 18 (2010)).

22. DEL. CODE ANN. tit. 6, § 18-1101(b) (2010). "Limited liability company agreement" is the term used in the Delaware law for what is called an "operating agreement" in most other state statutes. *Id.* § 18-101(7).

23. Even before Justice Cardozo extolled the "punctilio of an honor most sensitive" in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928), any modification or elimination by contract of a fiduciary duty was considered against public policy. *See* Kleinberger, *supra* note 4, at 460–61. Delaware, however, has now made the principle of freedom of contract the controlling public policy. *See* Ann E. Conaway, *Why No Respect? The Contractual Duties of Good Faith and Fair Dealing in Delaware* (Widener Law Sch., Legal Studies Research Paper No. 08-05, 2007).

24. DEL. CODE ANN. tit. 6, §18-1101(c) (2010) (emphasis added to show additional language supplied by the legislature); *see* Kleinberger, *supra* note 4, at 463 (explaining that the reference to eliminating duties was added in 2004 in response to *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160 (Del. 2002), ruling otherwise).

25. Chrisman, *supra* note 2 at 459–60.

26. *Id.* at 460.

27. *Id.* at 468–73.

28. *Id.* at 462. It should be noted, however, that business owners occasionally organize publicly traded entities as LLCs, though as of yet, they are not a viable competitor to corporations. *Id.*

Publicly traded entities are not subject to the pressure to avoid double taxation because even partnerships are subject to double taxation if they are publicly traded.[29]

III

THE RECENT PROLIFERATION OF ENTITY FORMS

At the same time the tension between limited liability and flow-through taxation was being resolved by the development of LLCs, the increasing attention being paid to entity laws led to other developments as well. The rapid pace of change in entity laws over the past twenty years can be seen just by looking at national-level developments involving uniform and model entity laws:

1. The Uniform Partnership Act, first approved by the NCCUSL in 1914, was revised in 1992, and amended again four times in the next five years. The 1996 amendments provided for limited-liability partnerships.[30]

2. The Uniform Limited Partnership Act was originally approved by the NCCUSL in 1916,[31] was revised in 1976, and amended again in 1985 and 2001. The 2001 amendments provided for limited-liability limited partnerships.[32]

3. The Uniform Unincorporated Nonprofit Associations Act was adopted by the NCCUSL in 1996[33] and revised in 2008.[34]

4. The Model Entity Transactions Act, which regulates transactions like mergers and conversions between different entity forms, was jointly approved by the NCCUSL and the American Bar Association (ABA) in 2005[35] and amended in 2007.[36]

5. The Model Registered Agents Act, which provides consistent rules regarding service of process on entities, was approved by the NCCUSL in 2006.[37]

6. The Uniform Limited Cooperative Association Act was approved by the NCCUSL in 2007.[38]

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29. I.R.C. § 7704 (2009). Publicly traded partnerships in a few industries, such as oil pipelines, are allowed to use flow-through taxation, but those exceptions are very limited. *Id.* § 7704(c).

30. UNIF. P'SHIP ACT quick chronology (1997).

31. *Id.* prefatory note (1976).

32. UNIF. LTD. P'SHIP ACT prefatory note (2001).

33. UNIF. UNINCORPORATED NONPROFIT ASS'N ACT (1996).

34. REVISED UNIF. UNINCORPORATED NONPROFIT ASS'N ACT (2008).

35. MODEL ENTITY TRANSACTIONS ACT (2005).

36. *Id.* (2007).

37. MODEL REGISTERED AGENTS ACT (2006).

7. The Uniform Statutory Trust Entity Act, which governs business trusts, was approved by the NCCUSL in 2009.[39]

8. The Business Organizations Act, which provides a framework for organizing all of a state's entity laws into a single code and collects in one location all of the provisions regarding the administration of the state's entity laws by the secretary of state, was provisionally approved jointly by the NCCUSL and the ABA in 2009.[40]

9. The Model Nonprofit Corporation Act was completely revised by the ABA in 1987,[41] and then again in 2008.[42]

10. The Uniform Limited Liability Company Act was approved by the NCCUSL in 1996 and was completely revised in 2006.[43] Among other important changes, the Uniform Limited Liability Company Act now authorizes the organization of nonprofit LLCs.[44]

Throughout the time the foregoing revisions were occurring, the MBCA was also under constant revision. Just in the period since December 2007, when the fourth edition of the MBCA was published, seven separate sets of amendments have been adopted.[45]

The changes in entity law during the past two decades have resulted in a smorgasbord of entity types available to entrepreneurs and lawyers when

38. UNIF. LTD. COOP. ASS'NS ACT (2007).

39. UNIF. STATUTORY TRUST ENTITY ACT (2009).

40. BUS. ORGS. ACT (2009).

41. REVISED MODEL NONPROFIT CORP. ACT (1988).

42. MODEL NONPROFIT CORP. ACT (3d ed. 2008).

43. UNIF. LTD. LIAB. CO. ACT (2006).

44. *Id.* § 104(b).

45. *See* Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed "Force the Vote" Amendments to Chapters 8, 9, 10, 11, 12, and 14*, 63 BUS. LAW. 511 (2008); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendment to Section 6.24*, 63 BUS. LAW. 525 (2008) (relating to delegation to officers of authority to grant options); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendment to Section 6.24, Adoption of Section 8.26 ("Force the Vote") and Related Amendments to Chapters 9, 10, 11, 12, and 14*, 63 BUS. LAW. 1275 (2008); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Shareholder Proxy Access Amendments to Chapters 2 and 10*, 64 BUS. LAW. 1157 (2009); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Incorporate Electronic Technology Amendments*, 64 BUS. LAW 1129 (2009); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Amendments to Incorporate Electronic Technology Amendments in Section 1.41 and to Adopt Related Amendments*, 65 BUS. LAW. 885 (2010); Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments to Shareholder Voting Provisions Authorizing Remote Participation in Shareholder Meetings and Bifurcated Record Dates*, 65 BUS. LAW. 153 (2009).

forming a business. Looking only at the options available under uniform- and model-entity laws, the choices include the following:[46]

1. Business corporation;
2. Statutory close corporation;[47]
3. General partnership, which can be either:
   A. A limited liability partnership or
   B. A traditional general partnership without a liability shield;
4. Limited partnership, which can be either:
   A. A limited-liability limited partnership or
   B. A traditional limited partnership without a liability shield for the general partner;
5. LLC, which can be
   A. Member-managed,
   B. Manager-managed, or
   C. Single-member;
6. Limited cooperative;
7. Statutory trust, which can either
   A. Have series or
   B. Not have series.[48]

IV

CROSS-ENTITY MERGERS AUTHORIZED

One of the consequences of the increasing growing popularity of LLCs and the proliferation of other entity forms described was an increasing likelihood that transactions would involve businesses organized in different forms. In recognition of the need to facilitate cross-entity transactions, the existing provisions in the MBCA on mergers and share exchanges were amended in

46. These entity forms are available in most states. There also exists a wide variety of other types of unincorporated entities that are outside the scope of this article, including, for example, professional corporations, professional LLCs, professional service corporations, professional associations, and series LLCs. Choosing the appropriate form of entity from the list is even more complicated than just the list itself would suggest because the list omits any reference to the choices that are available for how the various types of entities may be taxed.

47. The Statutory Close Corporation Supplement to the MBCA, a model law that governed close corporations, was discontinued by the Committee on Corporate Laws upon the publication of the fourth edition of the MBCA. *See* MODEL BUS. CORP. ACT intro. n.3 (2008).

48. A statutory trust may have different series that segregate or partition property within the statutory trust. An important characteristic of a series trust is that the liabilities of each series are limited to that series, rather than the trust as a whole or to other series. *See* UNIF. STATUTORY TRUST ENTITY ACT § 401 (2009).

1999 to authorize a corporation to be a party to a merger or share exchange in which one or more of the parties was an "other-entity."[49] The other-entities that could be a party to a merger or share exchange were defined in section 11.01(d) of the MBCA as "any association or legal entity, other than a domestic or foreign corporation, organized to conduct business, including, without limitation, limited partnerships, general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies, and business trusts."[50] The phrase "organized to conduct business" was somewhat ambiguous, but probably meant that a corporation was not authorized to engage in a merger or share exchange with a nonprofit entity such as a nonprofit corporation or an unincorporated nonprofit association.[51] In addition to authorizing a corporation to merge with an other-entity, the 1999 amendments also permitted an other-entity to be the survivor in a merger even if the merging parties were all corporations. Finally, the 1999 amendments permitted ownership interests in an other-entity to be used as consideration in a merger or share exchange. For example, if an LLC were the sole shareholder of corporation *A*, and corporation *A* was merging with corporation *B*, the shareholders of corporation *B* could now receive interest in the LLC in exchange for their shares in corporation *B*.[52]

Because a merger or share exchange might result in a shareholder of a business corporation becoming the holder of an interest in an other-entity that provided less than a full liability shield for its owners, the 1999 amendments required a separate written consent to acquire personal liability from each shareholder who would become subject to personal liability for the obligations or liabilities of any other person or entity.[53] The application of that rule was limited to shareholders of domestic business corporations because the requirements for approval of a merger or share exchange by shareholders of a foreign corporation, or by interest holders in a domestic or foreign other-entity, would be controlled by the organic law[54] of the foreign corporation or the other-entity.

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49. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Pertaining to Appraisal Rights and to Fundamental Changes—Final Adoption*, 55 BUS. LAW. 405 (1999). For the full text of the changes, see Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Fundamental Changes*, 54 BUS. LAW. 685 (1999).

50. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Fundamental Changes*, *supra* note 49, at 729.

51. As discussed below at part V, transactions with nonprofit entities were subsequently authorized in 2002.

52. *See* MODEL BUS. CORP. ACT § 11.02 cmt. 3 (1999) (explaining that interests in other-entities may be used as consideration in mergers); *id.* § 11.03 (authorizing the use of interests in other-entities as consideration in share exchanges).

53. *Id.* § 11.04(h).

54. "Organic law" is the term used in the Model Entity Transactions Act and the Business Organizations Act to refer to the state law that governs the internal affairs of an entity. MODEL ENTITY TRANSACTIONS ACT § 102(26) (2007); BUS. ORGS. ACT § 1-102(26) (Annual Meeting Draft 2009). The laws listed in part III are all organic laws.

Whereas limiting the rules in the MBCA for shareholder approval of a merger or share exchange to domestic business corporations made sense in terms of the general scope and applicability of the MBCA, it created the possibility of a situation in which the law governing an other-entity desiring to engage in a transaction with a corporation would not authorize the transaction. A Delaware court encountered this situation in *Cole v. Kershaw*,[55] in which a partner in a Delaware general partnership challenged the validity of its merger into a Delaware LLC. Although the LLC statute authorized the merger of an LLC with a general partnership, the general partnership law did not authorize the transaction.[56] The court held that the merger was valid because the law regarding one of the entities authorized the merger, which was enough for the court to conclude that the legislative intent was to authorize the merger from the perspective of both entities.[57] Even though the rule in *Cole* validated mergers with an entity whose law did not provide for cross-entity mergers, it left the owners of such an entity exposed to the possibility that the entity could engage in a merger in which the owners would acquire personal liability without the ability to protect themselves by voting against the merger. This issue was not resolved in the MBCA until 2002.[58]

The 1999 amendments only applied to transactions involving a corporation. Because the 1999 amendments were being made to a corporation law, this limitation in their scope is understandable. But requiring the presence of a corporation at some point in the transaction meant that the amendments were not as useful as they could have been. A corporation could join with a limited partnership in a merger in which the survivor was a limited-liability company, even if the limited-partnership or LLC law did not authorize the merger, so long as the state adopted the rationale of *Cole*. But the 1999 amendments did not permit two limited partnerships to merge into a limited-liability company. The two limited partnerships could achieve this result, but only indirectly, by first merging into a corporation that would then merge into a limited-liability company.

V

CHAPTER 9 AND THE 2002 REVISIONS TO CHAPTER 11

The 1999 amendments on cross-entity mergers and share exchanges were revised and expanded in 2002.[59] The 2002 amendments authorized new types of

55. Cole v. Kershaw, No. Civ.A. 13904, 2000 WL 1206672 (Del. Ch. Aug. 15, 2000).

56. *Id.* at *6.

57. *Id.* at *7.

58. *See infra* Part V.

59. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Relating to Domestication and Conversion—Final Adoption*, 58 BUS. LAW. 219 (2002); *see also* Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act—Proposed Amendments Relating to Domestications and Conversions*, 56 BUS. LAW. 1633 (2001) (exposure draft).

transactions that were not previously available under the MBCA in an entirely new chapter 9, and also clarified several issues under the cross-entity merger and share-exchange provisions added to chapter 11 in 1999.

The most important and innovative provision in the new chapter 9 is subchapter E, which permits the conversion of an entity into and out of business-corporation form.[60] Beginning in 1999, a corporation could convert to a different form of entity by merging with a wholly owned subsidiary of the desired form. The 2002 changes allowed such transactions to occur directly through a single filing with the secretary of state.[61] As with the prior amendments to chapter 11, which authorized cross-entity mergers and share exchanges, the provisions of chapter 9 are limited to transactions in which a corporation is present at some point in the transaction.[62] If a corporation is converting to an entity in which the former shareholders would acquire personal liability, then the written consent of each such shareholder is required, mirroring the language of the provision added to chapter 11 in 1999.[63]

Separate subchapters C and D of chapter 9 authorize a business corporation to convert to a nonprofit corporation, as well as permitting a foreign nonprofit corporation to convert to a domestic business corporation.[64]

Finally, chapter 9 also provides for a corporation to change its state of incorporation in a transaction called "domestication" if the domestication is also permitted by the laws of the foreign state.[65] If the other state does not authorize domestications, then changing the jurisdiction of incorporation requires setting up a subsidiary corporation in the new state of incorporation and merging the existing corporation into the new subsidiary.

Although the 1999 amendments had protected shareholders from acquiring personal liability without their consent as a result of a merger or share exchange, the question of what liabilities a shareholder could acquire was not answered. The 2002 amendments provided clarity on this issue by adding new section 11.07(e), which provides that the personal liability a shareholder may acquire only extends to liabilities that arise after, not before, the merger or share exchange.[66]

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60. Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Relating to Domestication and Conversion—Final Adoption*, *supra* note 59, at 229.

61. MODEL BUS. CORP. ACT § 9.53(d) (2002).

62. *Id.* § 9.50(a).

63. *Id.* § 9.52(7).

64. *See id.* §§ 9.30–9.40. The conversion of a nonprofit corporation to a business corporation is not authorized by chapter 9. The official comment to section 9.30 explains that "[i]t is anticipated that a counterpart to [subchapter C] will be added to the Model Nonprofit Corporation Act which will provide a similar procedure for a nonprofit corporation to become a domestic business corporation." That in fact occurred, and the MODEL NONPROFIT CORPORATION ACT (3d ed. 2008) includes a new subchapter C authorizing a nonprofit corporation to convert to a business corporation.

65. MODEL BUS. CORP. ACT § 9.22(c) (2002).

66. *Id.* § 11.07(e). Similar provisions were also included in chapter 9. *See id.* § 9.55(d).

The 2002 amendments also removed the issue addressed in *Cole* regarding the ability of an entity, whose organic law does not authorize a merger with a corporation, to engage in such a transaction.[67] Section 11.02(a) expressly authorized all mergers involving a domestic business corporation, regardless of whether the law governing the other-entity provided such authorization.[68] Section 11.02(b.1) further provided that if the organic law of a domestic other-entity does not specify procedures for the approval of a merger, the merger may occur in accordance with the provisions applicable to corporations in chapters 11 and 13.[69] If the organic law of an other-entity does not require approval for a merger or share exchange, then the other-entity's interest holders must provide written consent pursuant to section 11.04(h) if those interest holders will acquire personal liability as a result of the merger or share exchange.

The definition of "other-entity," which determined what entities a corporation could merge with, was deleted from section 11.01 by the 2002 amendments and replaced with definitions of "eligible entity" and "unincorporated entity" in section 1.40:

> (7B) "Eligible entity" means a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation.
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> . . . .
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> (24A) "Unincorporated entity" means an organization or artificial legal person that either has a separate legal existence or has the power to acquire an estate in real property in its own name and that is not any of the following: a domestic or foreign business or nonprofit corporation, an estate, a trust, a state, the United States, or a foreign government. The term includes a general partnership, limited liability company, limited partnership, business trust, joint stock association and unincorporated nonprofit association.[70]

The explicit reference to nonprofit corporations resolved the ambiguity in the former definition of "other-entity" in favor of allowing mergers between for-profit and nonprofit corporations.

In addition to allowing conversions into and out of nonprofit-corporation form, the 2002 amendments also allowed nonprofit corporations and unincorporated nonprofit associations to participate in the transactions provided for under the new chapter 9.[71] To prevent a merger or other transaction from being used to avoid restrictions on the use of property held by a nonprofit entity, the new sections 9.02(b) and 11.02(f) require judicial or governmental approval for any diversion of donated property contemplated by means of a conversion or merger.[72]

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67. *See supra* Part IV.

68. MODEL BUS. CORP. ACT § 11.02(a) (2002).

69. *Id.* § 11.02(b.1).

70. *Id.* § 1.40.

71. *See* Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act Relating to Domestication and Conversion—Final Adoption*, *supra* note 59, at 219.

72. MODEL BUS. CORP. ACT § 9.02(b) (2002) ("Property held in trust or for charitable purposes under the laws of this state by a domestic or foreign eligible entity shall not, by any transaction under this chapter, be diverted from the objects for which it was donated, granted or devised, unless and until

VI

THE MODEL ENTITY TRANSACTIONS ACT

The provisions of the MBCA authorizing cross-entity transactions are limited to transactions in which a corporation is present at some point in the transaction. Similarly, the provisions on cross-entity mergers in the uniform unincorporated-entity laws only address transactions in which an entity subject to the law is a party.[73] Both the Committee on Corporate Laws of the ABA Section of Business Law, which is responsible for drafting the MBCA, and the National Conference of Commissioners on Uniform State Laws, which is responsible for drafting the uniform unincorporated-entity acts, recognized that "a better approach would be for states to enact a single statute covering all types of restructuring transactions by and among all types of entity forms."[74] Consequently, the two organizations combined their efforts to draft the Model Entity Transactions Act (META).

The META permits cross-entity transactions involving any type of entity. Its provisions regarding conversions, mergers, and interest exchanges are similar to chapters 9 and 11 of the MBCA, but without being restricted to transactions involving a corporation.[75] For example, like the MBCA, the META also requires the owners of a limited-liability entity to consent before a merger if they will acquire personal liability in the surviving entity.[76]

The scope of the META is not limited to for-profit entities. Since nonprofit entities may be parties to transactions under the META, it includes a provision similar to section 11.02(f) of the MBCA protecting a nonprofit entity's restricted assets from being diverted from the charitable purpose for which they are held.[77] The META also includes a similar provision requiring regulatory approval if an entity is engaged in a regulated industry.[78]

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the eligible entity obtains an order of [court] [the attorney general] specifying the disposition of the property to the extent required by and pursuant to [cite state statutory cy pres or other nondiversion statute]."); *id*. § 11.02(f) (providing a similar rule).

73. *See, e.g.*, UNIF. LTD. LIAB. CO. ACT § 1002 (2006) (providing for mergers between LLCs and other business entities); UNIF. LTD. P'SHIP ACT § 1106 (2001) (authorizing mergers between limited partnerships and other business entities); UNIF. P'SHIP ACT § 905 (1997) (restricting partnership mergers to combining partnerships with limited partnerships or other partnerships).

74. MODEL ENTITY TRANSACTIONS ACT prefatory note (2007).

75. *Compare id.* §§ 201–206 (mergers), *id.* §§ 301–306 (interest exchanges), *and id.* §§ 401–406 (conversion), *with* MODEL BUS. CORP. ACT §§ 11.01–11.08 (2002) (mergers and share exchanges), *and id.* §§ 9.50–9.56 (conversion).

76. MODEL ENTITY TRANSACTIONS ACT § 203(a)(2)(B) (2007).

77. *Id.* § 104(b) ("Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [act] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, or devised unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of [name of court] [the attorney general] specifying the disposition of the property.").

78. *Id.* § 104(a) ("A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer in order to be a party to a merger must give the notice or obtain the approval in order to be a party to an interest exchange, conversion, or domestication.").

The META includes an appendix designed to assist an enacting state in integrating the provisions of the META with its existing entity laws.[79] The appendix describes four different ways in which that can be done.

Using the first option, a state may remove any provisions on cross-entity transactions from existing organic laws, but leave in place any provisions on transactions involving the same type of entity. If an existing organic law does not authorize mergers and other fundamental transactions, it is not necessary to add provisions for transactions involving just that type of entity because the META will supply those provisions.

The second option is a variation on the first approach. Provisions on cross-entity transactions may be removed from existing organic laws, and provisions authorizing transactions among the same form of entity may be added to each organic law if not already present. This will result in a statutory scheme in which all cross-entity transactions are conducted under the META and all same-entity transactions are conducted under that entity's organic law.

In the third option, all provisions on mergers and other transactions may be removed from the state's existing organic laws, leaving all of those transactions to be conducted just under the META.

As a fourth approach, the state may leave in place the provisions on domestications in chapter 9, subchapter B of the MBCA, and the provisions in chapter 11 on mergers and share exchanges, but only as they relate to transactions involving corporations. The state would then make the META the exclusive statute for conducting all mergers and other fundamental transactions involving unincorporated entities. This option was included because the drafting group that prepared the META was not sure what position the Committee on Corporate Laws would take regarding how to integrate the MBCA with the META.

With its universal application to all types of entities and its suggestion of extensive conforming amendments to individual organic laws, the META was an important first step toward integrating state organic laws into a single, coherent body of law.

VII

THE BUSINESS ORGANIZATIONS ACT

After providing an integrated set of provisions on cross-entity mergers and other fundamental transactions, the next logical step is to provide a framework for states to completely integrate their organic laws into a single code. The Business Organizations Act (BOA), jointly drafted by the ABA and NCCUSL, aims to fulfill this need. The BOA provides a single set of provisions dealing with all of the aspects of organic laws involving the secretary of state, including filing mechanics,[80] the requirements for names of entities,[81] registered agents and

79. *Id.* at app. 2.

80. BUS. ORGS. ACT pt. 2 (Annual Meeting Draft 2009).

registered offices,[82] qualification of foreign entities,[83] and the administrative powers of the secretary of state.[84] In addition, the BOA is organized so it can be combined with the META and individual organic laws as separate articles in a "hub" and "spoke" arrangement.[85] By providing the common provisions, the BOA acts as the hub of the system, with the other entity laws superseded by the provisions of the BOA on common subjects. For example, the BOA provides a section on certificates of good standing that can apply to any entity filing documents with the secretary of state.[86] Instead of each organic law providing how to obtain such a certificate, or worse, providing a different method for obtaining such a certificate for each different type of entity, the organic laws may simply rely on section 1-208 of the BOA to provide a single, uniform procedure.

The BOA received a third reading at the 2009 annual meeting of the NCCUSL, but it has not yet been recommended by the NCCUSL for enactment by the states. Final approval was postponed until work on the harmonization project (discussed in the next part) has been completed. As with the META, the final version of the BOA will need to include detailed instructions, which have not yet been drafted, regarding the amendments an enacting state will need to make to its organic laws to integrate them with the BOA into a single code.

VIII

THE HARMONIZATION OF ENTITY LAWS

A final step toward creating an integrated and coherent set of entity laws involves harmonizing the texts of the various entity laws.[87] Harmonizing these texts involves determining which aspects are common to all entities and which aspects are unique.

Compare, for example, the liability shield for shareholders in the MBCA with the liability shield provided in the ULLCA:

81. *Id.* at pt. 3.

82. *Id.* at pt. 4. Note that the BOA provisions in these matters are patterned after the Model Registered Agents Act.

83. *Id.* at pt. 5.

84. *Id.* at pt. 6.

85. *Id.* at prefatory note.

86. *Id.* § 1-208.

87. *See generally* William H. Clark, Jr., *Rationalizing Entity Laws*, 58 BUS. LAW. 1005 (2003).

Model Business Corporation Act § 6.22(b) (2008)	**Uniform Limited Liability Company Act § 304(a) (2006)**
Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.	The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise: (1) are solely the debts, obligations, or other liabilities of the company; and (2) do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.

Harmonizing those provisions on limited liability first requires determining whether corporations and LLCs should share the same rule on limited liability. Assuming for the sake of argument that, as a policy matter, the limited liability of members in an LLC should be identical to the limited liability of shareholders in a corporation, then the question becomes how the wording of the two statutes should be conformed. A state could amend the language in each statute so the statutes all conform to each other,[88] or it could incorporate by reference the provision on limited liability found in a particular entity law into the other entity laws.[89]

The analysis required by the harmonization process should provide a greater understanding of the difference among entity types and how those differences may affect the choice of entity form. Consider, for example, the fact that in the foregoing formulations of the liability shield, the ULLCA applies its liability limits to both members and managers while the MBCA provision only applies to shareholders. A manager of an LLC has a position that can combine elements of the functions of directors and officers in a corporation.[90] This similarity raises the questions of whether (1) the MBCA should include a liability shield for directors or officers, (2) the ULLCA is wrong to provide a

88. This has been done in Pennsylvania. *See* 15 PA. CONS. STAT. § 1526(a) (2010) (corporations); *id.* § 8523(a) (limited partnerships); *id.* § 8922(a) (limited liability companies).

89. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3803 (2010) (providing that beneficial owners of a statutory trust "shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the State"); *see also* 15 PA. CONS. STAT. § 9506(a)(1) (2010) ("Except as otherwise provided in the instrument, the beneficiaries of a business trust shall be entitled to the same limitation of personal liability as is extended to shareholders in a domestic business corporation.").

90. *Compare* UNIF. LTD. LIAB. CO. ACT § 407 (2006) (describing the management of an LLC), *with* MODEL BUS. CORP. ACT §§ 8.01, 8.41 (2008) (describing the functions of directors and officers of corporations).

liability shield for managers, or (3) this represents a fundamental difference between a corporation and an LLC and the differing rules should be retained.

To give just one more example of the issues involved in harmonization, consider the provisions in the MBCA and the ULLCA regarding the certificate the secretary of state will issue concerning the status of an entity. The ULLCA provision set forth below is a proposed revision of the current ULLCA that NCCUSL has developed as part of a drafting project to harmonize all of the various uniform unincorporated-entity laws. This proposed text is used as an illustration because it highlights the issues the Committee on Corporate Laws will need to consider if the MBCA is to be harmonized with the laws applicable to all other entities on this subject.

MODEL BUSINESS CORPORATION ACT § 1.28 (2008)	PROPOSED UNIFORM LIMITED LIABILITY COMPANY ACT § 211 (2010)
CERTIFICATE OF EXISTENCE (a) Anyone may apply to the secretary of state to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation. (b) A certificate of existence or authorization sets forth: (1) the domestic corporation's corporate name or the foreign corporation's corporate name used in this state; (2) that (i) the domestic corporation is duly incorporated under the law of this state, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in this state; (3) that all fees, taxes, and penalties owed to this state have been paid, if (i) payment is reflected in the records of the secretary of state and (ii) nonpayment affects the existence or authorization of the domestic or foreign corporation; (4) that its most recent annual report required by section 16.21 has been filed with the secretary of state; (5) that articles of dissolution have not been filed; and (6) other facts of record in the office of the secretary of state that may be requested by the applicant. (c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the secretary of state may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state.	CERTIFICATE OF GOOD STANDING OR REGISTRATION. (a) On request of any person, the [secretary of state] shall issue a certificate of good standing for a limited liability company or a certificate of registration for a qualified foreign limited liability company. (b) A certificate under subsection (a) must state: (1) the limited liability company's name or the qualified foreign limited liability company's name used in this state; (2) that the limited liability company is formed under the law of this state and the date of its formation, or that the qualified foreign limited liability company is registered to do business in this state; (3) that all fees, taxes, and penalties owed to this state by the limited liability company or the qualified foreign limited liability company and collected through the [secretary of state] have been paid, if: (A) payment is reflected in the records of the [secretary of state]; and (B) nonpayment affects the good standing or registration of the limited liability company or foreign limited liability company; (4) that the most recent annual report required by Section 209 has been delivered for filing to the [secretary of state]; and (5) that, with respect of a limited liability company, no statement of dissolution, statement of termination, or declaration of dissolution has been filed and no proceeding is pending under Section 705. (c) Subject to any qualification stated in the certificate, a certificate issued by the [secretary of state] under subsection (a) may be relied upon as conclusive evidence of the facts stated in the certificate.

There are a number of immediately obvious differences between those two provisions:

1. The name of the document to be issued is different. Although this difference may seem mundane, it has practical implications. If the secretary of state keeps blank forms of certificates, he or she will need two sets of forms; if the certificates are electronic, the computer system will need to be programmed to reflect the difference in terminology.

2. The MBCA requires a value judgment by the secretary of state that a corporation has been "duly incorporated."

3. The statement by the secretary of state that all fees, taxes, and penalties have been paid is limited by the ULLCA to money collected *through* the secretary of state.

4. The MBCA refers to the annual report that "has been filed with the secretary of state" in contrast to the ULLCA, which refers to the annual report "delivered for filing" to the secretary of state. That seemingly minor difference raises the underlying question of what "filing" a document means.

5. The ULLCA certificate is conclusive evidence of the facts stated in the certificate, whereas the MBCA certificate is conclusive evidence only of the status of the corporation.

Some states have undoubtedly been conducting an informal harmonization as they have enacted various entity laws.[91] The goal of the formal harmonization process is to conduct the analysis in a comprehensive way that will produce an agreed consensus on a consistent body of entity law.

IX

A LOOK INTO THE FUTURE

The foregoing discussion raises important questions for the future development of the MBCA, the most important of which are undoubtedly (1) what will be the continuing relevance of the MBCA and (2) how the MBCA will fit into the future development of U.S. entity law.

Corporations have been replaced by LLCs as the dominant entity of choice when organizing a business that is not publicly traded. At the same time, most publicly traded corporations are not incorporated under a state law based on the MBCA. A recent study of publicly traded corporations found that the ten states with the most incorporations under their laws accounted for 82.10% of all

91. *See, e.g.*, 15 PA. CONS. STAT. ANN. § 1526 amended committee cmt. (2010) ("This section [on corporate shareholder liability] was rewritten . . . to conform its wording to the other provisions of Title 15 relating to the personal liability of an equity owner of an association."); *cf.* 15 PA. CONS. STAT. § 8523(a) (2010) (limited partners); *id.* § 8922(a) (members and managers of a limited liability company).

publicly traded corporations.[92] Of those ten states, only two used the MBCA as the basis for their corporation laws,[93] and the corporations incorporated under their laws represented only 4.34% of all publicly traded corporations.

Although the MBCA might appear to be losing its influence in absolute numerical terms, it continues to have an important influence on the development of corporation law. The MBCA is the basis for the *Corporate Director's Guidebook*[94] and, thus, it has an important influence on corporate governance as it occurs within the boardroom. Recent amendments to the MBCA dealing with issues of particular relevance to publicly traded corporations—such as majority voting in the election of directors, proxy access, and bifurcated record dates—have had an important influence on the public debate regarding those issues.[95]

The greatest challenge to the continuing relevance of the MBCA would seem to be in the area of privately owned entities. But even in that area, there is likely to be a substantial number of businesses organized as S-corporations for the foreseeable future. There are many existing S-corporations for which the tax cost of converting to an entity with flow-through taxation does not justify the change.[96] The use of an S-corporation by certain types of businesses may also be desirable to reduce the payroll taxes payable by the owners of the business.[97]

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92. Lucian Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 392 tbl.2 (2003). The top ten states are Delaware, California, New York, Nevada, Minnesota, Florida, Texas, Colorado, Pennsylvania, and Massachusetts. *Id.* These numbers exclude incorporations of financial-services companies.

93. The states that base their corporation laws on the MBCA are Florida and Massachusetts. MODEL BUS. CORP. ACT introductory cmt. n.1 (2008).

94. COMM. ON CORPORATE LAWS, CORPORATE DIRECTOR'S GUIDEBOOK (5th ed. 2007).

95. *See, e.g.*, Troy A. Paredes, Comm'r, Sec. & Exchange Comm'n, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations (May 20, 2009), *available at* http://www.sec.gov/news/speech/2009/spch052009tap.htm (discussing MBCA amendments regarding shareholder director nominations); Kathleen L. Casey, Comm'r, Sec. & Exchange Comm'n, Statement at Open Meeting to Propose Amendments Regarding Facilitating Shareholder Director Nominations (May 20, 2009), *available at* http://www.sec.gov/news/speech/2009/spch052009klc.htm (discussing MBCA amendments regarding shareholder director nominations).

96. An existing S-corporation with assets that have appreciated in value that liquidates and contributes its assets to an LLC may subject its shareholders to tax upon liquidation. The liquidation of appreciated property results in recognition of gain at the S-corporation level, which then flows through to the shareholders, increases their stock bases, and is subject to tax. I.R.C. §§ 311, 1367, 1371(a) (2010). Additionally, a shareholder may recognize additional gain if the net fair-market value of the property received exceeds the shareholder's stock basis. *Id.* § 331.

97. Distributions to shareholders of S-corporations are not subject to Federal Insurance Contributions Act (FICA) taxes (which fund the federal Social Security and Medicare programs), unlike wages earned by employees, or to Self-Employment Contributions Act (SECA) taxes (which also fund the federal Social Security and Medicare programs). I.R.C. §§ 1401, 1402(a)(2), 3101, 3121 (2010). By contrast, certain members of an LLC pay SECA taxes on all of the income allocated to them (generally, non-manager members of a manager-managed LLC may be exempt from SECA taxes if they do not participate in the business for over five-hundred hours per year and are not members in a service LLC). *Id.* §§ 1401, 1402; Prop. Treas. Reg. § 1.1402-2(h), 62 Fed. Reg. 1702, 1704 (Jan. 13, 1997).

If there will continue to be a significant number of privately owned corporations subject to the MBCA for the foreseeable future, the question then becomes how the rules these privately owned corporations are subject to in the MBCA should compare to the rules they would be subject to if they were organized as LLCs. The issue in this regard is largely the question of freedom of contract since the statutory default rules have less significance if they can be varied by contract. Although some commentators are fond of describing LLCs as creatures of contract (in contrast to corporations, which they see as creatures of statute), this view ignores the long established fact that corporations are also creatures of contract.[98] The real difference is not whether only one is a creature of contract, but rather how much of the contract is prescribed by the state and how much it may be varied by agreement of the parties.

Section 7.32 of the MBCA recognizes the importance of allowing shareholders in privately owned corporations the freedom of contract to design their own governance structure. Section 7.32, however, takes the opposite approach to freedom of contract from that taken in unincorporated-entity laws. The approach of the uniform unincorporated-entity laws is to provide for freedom of contract except with respect to a discrete list of issues.[99] Section 7.32, on the other hand, provides that a contract among the shareholders may only deal with a number of specified issues. As a result, a person drafting a shareholders agreement under the MBCA has to ask whether a particular provision is described in section 7.32; whereas a person drafting a governing document for an unincorporated entity has the much easier task of simply deciding whether a particular provision is included in the list of forbidden subjects. If section 7.32 were revised to use the approach of the unincorporated-entity laws, there would be little substantive difference (except with respect to taxes) between the use of a corporation or an unincorporated entity, unless the list of provisions that could not be varied by contract was different between the MBCA and the unincorporated-entity law. It would also be helpful for the two types of laws to take the same approach to defining permissible freedom of contract because any inherent differences among entity forms would be much more apparent.

The foregoing discussion has focused largely on changes to the MBCA, but a final prediction about the continuing value of corporation law is also implied: Now that freedom of contract has been established for unincorporated entities, it is likely that there will be a gradual move to add default rules patterned after the established rules for corporations to the organic laws for unincorporated entities. Existing LLC laws in particular could benefit from this development. Many subjects, such as procedures for calling meetings of the owners and giving

98. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (holding that the charter creating Dartmouth College, itself a corporation, was a contract between New Hampshire and the college); *see also* LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY 53–54 (4th ed. 1998).

99. *See* UNIF. LTD. LIAB. CO. ACT § 110 (2006); UNIF. LTD. P'SHIP ACT § 110 (2001); UNIF. P'SHIP ACT § 103 (1997).

notice of those meetings, are not dealt with in existing LLC laws. Adding default rules on those types of subjects would make the drafting of governing agreements easier by creating a commonly understood base of rules that will apply unless the owners affirmatively decide to vary them.

Drawing additional default rules for unincorporated entities from corporation law will also provide greater certainty for transactions involving unincorporated entities and will facilitate the giving of legal opinions in those transactions. An example is the amendments made in 2002 to the Delaware Limited Liability Company Act,[100] which confirmed that Delaware LLCs could make contracts of guaranty and suretyship[101] and that members of a Delaware LLC do not have preemptive rights except as provided by contract.[102]

The net result of the developments outlined in this article should be a system of entity organic laws that is more organized, coherent, and predictable. The MBCA will no longer occupy the dominant position it did for the first several decades after it was prepared in 1950, but it will continue to be an important influence on the meaning and continued development of U.S. entity law.

100. DEL. CODE ANN. tit. 6, ch. 18 (2010).

101. *Id.* tit 6, § 18-106(c) (giving limited liability companies the right to make contracts of guaranty and suretyship); *cf. id.* tit. 8, § 122(13) (giving Delaware corporations the power to make contracts, including contracts of guaranty and suretyship).

102. *Id.* tit. 6, § 18-301(e) (denying limited liability companies preemptive rights); *cf. id.* tit. 8, § 102(b)(3) (denying corporation stockholders preemptive rights).