21世纪商法论坛
21st Century Commercial Law Forum Report

清华大学商法研究中心○主办
Commercial Law Center of Tsinghua University

Modern Development of the Law of Non-incorporated Enterprises

非公司企业法制的当代发展

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图书在版编目（CIP）数据

非公司企业法制的当代发展/王保树主编．—北京：社会科学文献出版社，2009.1

（21世纪商法论坛）

ISBN 978-7-5097-0499-8

Ⅰ.非…　Ⅱ.王…　Ⅲ.企业法-研究　Ⅳ.D912.290.4

中国版本图书馆CIP数据核字（2008）第180046号

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出 版 者／社会科学文献出版社
地　　址／北京市东城区先晓胡同10号
邮政编码／100005
网　　址／http：//www.ssap.com.cn
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总 经 销／社会科学文献出版社发行部
　　　　（010）65139961　65139963
经　　销／各地书店
读者服务／市场部（010）65285539
排　　版／北京步步赢图文制作中心
印　　刷／北京季蜂印刷有限公司

开　　本／787×1092毫米　1/16
印　　张／25.5
字　　数／593千字
版　　次／2009年1月第1版
印　　次／2009年1月第1版印刷

书　　号／ISBN 978-7-5097-0499-8
定　　价／65.00元

序

在市场经济条件下，商业组织不只是公司一种形式，而是多元的结构。在公司之外，还有合伙企业、个人独资企业，甚至还有合作社企业。应该说，它们各有自己的适应性，公司尤其是股份公司更多地被大企业采用，合伙企业、个人独资企业则更多被小企业采用。公司可能为国民经济创造更多的 GDP，而合伙企业、个人独资企业多为劳动密集型企业，可以创造更多就业机会，各有自己的优势。就此意义而言，它们在地位上不应有高低之别，都应该被重视。正像一首歌唱的那样，“只要人人都献出一点爱，世界将变成美好的人间”。当人们“爱”公司“爱”得很深的时候，也应该将“爱”投向合伙企业、个人独资企业。换句话说，当我们研究企业法制现代化的时候，不仅要讨论公司法制的现代化，也要花力量研究其他企业法制的现代化。虽然合伙企业、个人独资企业是古老的企业形态，但它们同样希望在现代市场经济环境下焕发美好的青春。

在我国，非公司企业法制的发展走了一条很有特色的路。其他大陆法系国家，或将个人独资营业、合伙营业规定在商法典之中，或将其规定在民法典之中。而在我国，合伙企业是在民法之外单独立法的，也就是说，凡是合伙采用了企业形式的，应首先适用合伙企业法。个人独资企业，由个人出资并对企业债务承担无限责任，也单独制定为个人独资企业法。由此，中国的商业组织法已成为一个体系。当然，还需要适应市场经济的发展不断完善。

近几年，亚洲地区国家和地区在传统公司法之外的非公司企业立法方面也有很大发展，并且，表现了不同法系的交融和渗透，各具特色。日本率先引入了有限责任合伙，但其法律上称为“有限责任合伙契约法”，并且，出资人都是承担有限责任的。中国 2006 年修订了合伙企业法，其中引入了有限责任合伙企业，但基于它是普通合伙企业的一个类别，也严格区别于有限合伙企业，并让一般人容易理解的考虑，将其称为特殊的普通合伙企业。中国 2006 年修订的合伙企业法还引入了有限合伙企业，它由一个以上的普通合伙人与一个以上的有限合伙人组建而成。我国台湾地区也引入了有限合伙，但不同于大陆的合伙企业法，而将有限合伙定位为社团法人。2005 年，日本公司法在亚洲第一次引入了“有限责任公司”，称之为“合同公司”，各国学者都很关注它的成长情况。上述的差异和问题点不可避免地引起中外学者的共同兴趣，所以，21 世纪商法论坛第七次国际学术会议特别选择了“非公司企业法制的当代发展”作为学术议题。会上，境内外学者集中讨论

了自然人独资企业、普通合伙企业、有限合伙企业、特殊的普通合伙企业（LLP）、美国式有限责任公司（LLC）等法律问题。现将论坛的成果编辑出版，以使读者共享。

此次国际论坛得到了蒋毅刚律师的支持，本书的出版又得到了社会科学文献出版社的大力协同，谨在此表示谢意。

王保树

2008 年 7 月 9 日

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基调发言

Two Decades of "Alternative Entities": From Tax Rationalization through Alphabet Soup to Contract as Deity

〔美〕Daniel S. Kleinberger *

Introduction

In 1988, unincorporated business organizations comprised a backwater in the U. S. law of business associations. Due to unlimited owner liability, general partnerships were the choice only of the ignorant, those constrained by regulations, or those who did not know they were making a choice. As for limited partnerships, the Tax Reform Act of 1986 had crippled their use as tax shelters,① and the Omnibus Budget Reconciliation Act of 1987 had eliminated "pass through" partnership tax status for almost all limited partnerships that were publicly traded. ②In U. S. law schools, introductory courses in "business associations" mentioned partnerships in passing, if at all. The principle dividing line within such courses was between corporations that were publicly traded and those that were closely held.

Today, twenty years later, the law of unincorporated business organizations is the cutting edge of U. S. entity law. Almost everywhere in the United States, more limited liability companies are

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* Professor of Law and Director of the Mitchell Fellows Program, William Mitchell College of Law; A. B. 1972, Harvard University; J. D. 1979, Yale Law School. Portions of this essay are based on Daniel S. Kleinberger, Agency, Partnership and LLCs: Examples and Explanations (Aspen 3rd ed. forthcoming 2007) [hereinafter Kleinberger, Agency, Partnership and LLCs] and other portions rely on Carter G. Bishop & Daniel S. Kleinberger, Limited Liability Companies: Tax And Business Law (Warren Gorham & Lamont/RIA 1994 & Supp. 2007 - 2) [hereinafter Bishop & Kleinberger, Limited Liability Companies]. As always, Professor Kleinberger's work depends on the insights and support of Carolyn Sachs, Esq.

① United States v. Southland Mgmt. Corp., 288 F. 3d 665, 669 n. 1 (5th Cir. 2002), rev'd on other grounds, 326 F. 3d 669 (5th Cir. 2003) (en banc).

② Pub. L. No. 100 - 203, tit. X, § 10211 (a), 101 Stat. 1330 - 403 (Dec. 22, 1987), enacting I. R. C. § 7704 (a).

formed each year than are corporations.[①] Throughout the United States, the limited liability partnership has resurrected the general partnership as a rationale entity choice,[②] and more than twenty states provide for limited liability limited partnerships.

As for the legal academy, law schools are slowly beginning to recognize that a single, one-semester course in "business organizations" is not possible. My own school now offers a one-semester course in Agency, Partnerships and Limited Liability Companies and another in Corporations. Other schools are taking the same or similar approaches. In 2002, the American Association of Law Schools granted permanent status to a section on Agency, Partnerships, Limited Liability Companies and Unincorporated Business Associations.[③]

Twenty years ago, the "alphabet" of U.S. business organizations was principally about S Corporations and C Corporations. Today, we have "alphabet soup" —not only S Corporations and C Corporations but also LLCs, LLPs, and LLLPs.

In my brief remarks this morning, I will chart, in the summary form, the past twenty years of developments in the U.S. law of unincorporated businesses, having two goals in mind: first, to provide for my fellow scholars in attendance an historical and conceptual context for understanding these developments; second, to reveal a radical—and to me disturbing—trend in U.S. law that has come to be seen as an integral part of the recrudescence of unincorporated business organizations in the United States.

The Historical and Conceptual Starting Point—The Tax Shield Conundrum[④]

Although unincorporated business organizations involve much more than tax concerns, it is impossible to understand the past twenty years without understanding key elements of the U.S. system for taxing the income of business organizations. That system distinguishes fundamentally between the taxation of organizations classified as partnerships and the taxation of organizations classified as corporations.

In most situations, partnership tax status is preferable, because corporate shareholders face "double taxation" on any dividends they receive. An ordinary "C corporation" is a taxable entity; it pays corporate income tax on any profits it earns. Dividends to shareholders are therefore made in "after-tax" dollars. Nonetheless, dividends are also taxable as received by the shareholders. Thus the profits comprising corporate dividends are taxed twice.

① See below and accompanying text.

② Daniel S. Kleinberger, Agency, Partnerships and LLCs § 7.3.

③ Howard M. Friedman, The Silent LLC Revolution—The Social Cost of Academic Neglect, 371 Berkley Electronic Press Legal Series 1, 38 (2004), http: //law. bepress. com/cgi/viewcontent. cgi? article =1961&context = expresso (citing e-mail from Prof. Gary Rosin) .

④ This section is derived closely from Kleinberger, Agency, Partnership and LLCs § 13. 1. 2.

Partners do not suffer double taxation, because a partnership is not a taxable entity. For income tax purposes, partnerships are "pass through" structures, with the business' profits (whether distributed or not) allocated and taxable directly to the partners. Partnership losses also "pass through" and can serve as deductions on each partner's own tax return. In contrast, the losses of an ordinary corporation stay with the entity and are useful only if the entity later enjoys a profit.

In 1988, the downside to partnership tax status was "owner liability"—i. e., to be taxed as a partnership an entity had to include at least one owner (almost always a "general partner") who was automatically liable for all debts of the entity. The driving force behind the development and spread of the limited liability company (and later the LLP and LLLP) has been the desire to solve this "the tax-shield conundrum"—i. e., to create an entity that:

- as a matter of non-tax, state law shields all of the entity's owners from the automatic personal liability of a general partner, while
- as a matter of tax law is classified as a partnership with each owner treated as a partner.

Before the advent of the LLC, entrepreneurs could resort to an ordinary limited partnership with a corporate general partner in order to achieve partnership tax status while minimizing liability risk. To obtain a full corporate shield while achieving some of the advantages of partnership tax status, entrepreneurs could use an S corporation or try to "zero out" the profits of a C corporation. None of these approaches was fully satisfactory.

Ordinary limited partnerships with a corporate general partner. Typically under this approach, a corporation would be formed for the sole purpose of serving as a limited partnership's general partner. This approach had a number of disadvantages, including: (i) complexity; (ii) a significant risk of "piercing" for the corporate general partner, unless that corporation had assets of its own (thereby diverting capital from use in the limited partnership's business); (iii) tax classification issues unless the corporate general partner had assets of its own; (iv) difficult questions of fiduciary duty pertaining to the officers of the corporate general partner (because, as a formal matter, those officers owed duties to the corporation but as a practical matter they were managing and typically controlling the limited partnership); and (v) before the modernization of the uniform limited partnership act, the "control rule", which impeded power-sharing by limited partners, even when "the deal" could be made only on that basis.

S corporations. An S corporation provides a full corporate liability shield with some of the benefits of pass-through tax status. Like a partnership, an S corporation generally pays no tax on its earnings, and its profits and losses are passed through and taxed directly to its shareholders. However, S corporations face significant constraints which do not apply to partnerships, including: (i) ownership restrictions—both numerically and in terms of the character of owners (i. e. , excluding most institutional and foreign investors); (ii) the "one class of stock" requirement, which restricts the type of debt the corporation may issue, hampers efforts to gradually shift control of family-owned businesses, and, in general, makes passive investment very difficult to structure; and (iii) preclusions of a long list of business types and structures.

C corporations and "zeroing out". A corporation that cannot elect S status, or chooses not to do so, can try to avoid double taxation by "zeroing out". To "zero out", the C corporation makes ostensibly deductible payments to shareholder-employees, thereby reducing or eliminating corporate profits. These payments can be made in a number of ways; the simplest is salaries and bonuses.

This approach is not risk-free, however. The Internal Revenue Service may view the payments as disguised dividends, especially where: (i) the payments are excessive compared with the value of the services rendered to the corporation, (ii) the payments are proportional to the shareholders equity interests, or (iii) capital is a material income-producing factor for the business and the corporation is not paying reasonable dividends. Even when successful, zeroing out techniques provide none of the other advantages of pass-through tax status.

Invention and Development of the Modern (U. S.) LLC①

Wyoming Starts a Revolution—Wyoming began the LLC revolution by taking seriously the Internal Revenue Service's "Kintner" Regulations on tax classification. Before January 1, 1997, those regulations determined how to classify unincorporated business organizations and were biased toward finding partnership status. The regulations identified four key corporate characteristics (limited liability, continuity of life, free transferability of ownership interests, centralized management), and classified an unincorporated organization as a corporation only if the organization had three or more of the corporate characteristics.

Although limited liability may seem to be the hallmark corporate characteristic, the Kintner Regulations contained no "super" factor. Each characteristic was as significant as each other.

In 1977, the Wyoming legislature sought to exploit that aspect of the Kintner Regulations in order to resolve the "tax-shield conundrum". The Wyoming LLC Act provided for a new form of business organization, with a full, corporate-like liability shield and partnership-like characteristics as to entity management, continuity of life, and transferability of ownership interests. Like a general partnership, a Wyoming LLC was managed by its owners. Like a limited partnership, a Wyoming LLC risked dissolution if one of its owners ceased to be an owner. As with any partnership,

① The name "limited liability company" appears in the jurisprudence of other nations, but that fact is a mere linguistic coincidence. "[E]xcept perhaps as to name, foreign LLCs are not antecedents to U. S. LLCs." Bishop & Kleinberger, Limited Liability Companies, ¶ 1.01 [4] [a]. Also, it is possible to find scattered references to limited liability companies in 19th century U. S. jurisprudence, "but those companies have no connection to the modern U. S. phenomenon". Id. ¶ 1.01 [4] [b].

Wyoming LLC ownership interests were not freely transferable; absent from a contrary agreement, an LLC member had the right to transfer only the economic aspect of the ownership interest.

If the Kintner Regulations meant what they said, then a Wyoming LLC would be accorded partnership tax status.

Common Characteristics of Early LLCs—The IRS took over ten years to acknowledge the consequences of its own tax classification regulations. Revenue Procedure 88－76 classified a Wyoming LLC as a partnership, and caused legislatures around the country to consider seriously the LLC phenomenon. For the most part, Wyoming's early emulators were faithful copiers, imposing through their LLC statutes the same basic structure as ordained in the Wyoming statute. The major innovation was to establish an alternative governance template for manager-management (modeled on the limited partnership structure), while continuing to set the "default mode" as member-management.

Fidelity to the Wyoming model gave the earliest LLCs some common characteristics—at least to the extent they followed the default blueprint of their respective LLC statutes. In the default mode, an LLC:

- was managed by its members in their capacity as members
  - under the Kintner Regulations—no centralized management (like a general partnership)
- was threatened with dissolution each time a member dissociated
  - under the Kintner Regulations—no continuity of life (like a limited partnership with respect to the dissociation of any general partner)
- allowed its members to freely transfer the economic rights associated with membership, but prohibited them from transferring their membership interest in toto (or any management rights associated with membership) without the consent of all the other members
  - under the Kintner Regulations—no free transferability of interests (like both a general and limited partnership)

In two senses, the LLC was a hybrid entity. It combined the liability shield of a corporation with the federal tax classification of a partnership; it housed a partnership-like capital structure and governance rules within a corporate liability shield.

IRS Bias Toward Manager-Managed LLCs—This characteristic picture began to lose focus in 1989 as the IRS began to loosen its approach to tax classification. In a series of public and private rulings, the IRS allowed for increasing flexibility of form, especially as to the continuity of life characteristic (i. e. , the nexus between member dissociation and at least the threat of entity dissolution) . This characteristic had done much to keep a "family resemblance" among LLCs because, until 1989, every LLC "blessed" by the IRS had lacked that characteristic. Beginning in

1989, the IRS began to accept both (i) a shrinking of the categories of member dissociation that threatened dissolution and (ii) a decrease in the quantum of member consent necessary to avoid dissolution following member dissociation. As a result, LLC organizers had a greater variety of structures from which to choose.

At the same time, however, the IRS's pronouncements on continuity of life and free transferability of interests were conducing towards a new characteristic LLC structure. Beginning with Private Letter Ruling 9210019, the IRS revealed a bias toward manager-managed LLCs. In contrast to a member-managed LLC, a manager-managed LLC could achieve partnership tax status while enjoying significant protection from business disruption and significant control over member exit rights. In both official and unofficial ways, the IRS suggested that, for purposes of tax classification, LLCs were properly analogized to limited partnerships rather than to general partnerships.

In 1994, the IRS issued Revenue Procedure 95－10 and made its earlier suggestion a matter of policy. Revenue Procedure 95－10 purported to provide guidelines for LLCs seeking advance assurance of partnership tax status under the Kintner Regulations, but in reality provided a series of safe harbors. Those safe harbors rested heavily on the limited partnership analogy.

"Check-the-Box" and the End to Family Resemblance—Revenue Procedure 95－10 might well have pushed LLCs into the limited partnership mold if the IRS had not subsequently decided to do away with the Kintner Regulations entirely. Effective on January 1, 1997, the Treasury Department adopted a "check-the-box" tax classification regime under which, in general, with regard to U. S. entities:

- a business organization organized under a corporate or joint stock statute is taxed as a corporation;
- any other business organization:
  - with two of more owners is taxed as a partnership,
  - with one owner is disregarded for income tax purposes, unless the organization elects to be taxed as a corporation (by "checking the box").

"Check-the-box" severed the connection between tax classification and organizational structure and invited entrepreneurs (and their attorneys) to specially tailor the structure of an LLC as each "deal" might require. "Check-the-box" also resulted in widespread changes to LLC statutes, as states moved quickly to take advantage of the newly permitted flexibility. These changes included:

- eliminating the requirement that an LLC have at least two members (like a general or limited partnership) and authorizing one-member LLCs;

- authorizing operating agreements in one-member LLCs;
- allowing LLCs to have perpetual existence;
- changing the default rule on member dissociation to make dissociation more difficult, either by:
  - o depriving members of the power to dissociate, or
  - o freezing in the economic interest of dissociated members;
- changing the default rule on the relationship between member dissociation and entity dissolution, either by:
  - o providing that member dissociation does not even threaten dissolution, or
  - o changing the quantum of consent necessary to avoid dissolution following a member's dissociation. ①

The Copycats—Limited Liability Partnerships and Limited Liability Limited Partnerships

The advent of limited liability companies had a ripple effect on the law of general and limited partnerships. Put most simply: if a limited liability company could shield its owners from automatic, vicarious liability for the enterprise's debts and still be taxed as a partnership, why not provide a comparable liability shield for general partners? Once the IRS acknowledged that its Kintner Regulations meant what they said, there was nothing in tax law to deter state legislatures from providing for both limited liability (general) partnerships—LLPs-and limited liability limited partnerships—LLLPs.

There remained non-tax forces of inertia, however. Most importantly, from a non-tax and historical perspective, a general partner's liability seemed inherently and inescapably the hallmark of partnership law. It took five years after the IRS's seminal ruling on LLCs for any state legislature to authorize limited liability partnerships. Moreover, the first LLP shield was decidedly inferior to an LLC or corporate shield-protecting against owner liability if the underlying, entity debt arose in tort but not in contract.

Today, in contrast, the limited liability partnership is firmly established and widespread, and the limited liability limited partnership is only a few steps behind. All states authorize LLPs, and a plurality of LLP statutes now provide a shield that is essentially indistinguishable from an LLC or corporate shield. More than 15 states provide for LLLPs. ②Under the Uniform Limited Partnership

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① States did not, however, change the default rules on transferability of ownership interests. Bishop & Kleinberger, Limited Liability Companies, ¶¶ 1. 08, Table of State LLC Characteristics, and 8. 06 [1] [a].

② Daniel S. Kleinberger, A User's Guide to the New Uniform Limited Partnership Act, 37 Suffolk U. L. Rev. 619, n. 170 (2004).

Act (2001) —now the law in sixteen states[①]—a limited partnership can originate as or become an LLLP simply by including a one-line statement in the certificate of limited partnership.

A limited liability partnership:

- is a general partnership that has invoked the limited liability partnership provisions of its governing general partnership statute
- by filing with a specified public official a specified document (typically called "a statement of qualification" or a "registration")
- thereby becoming a limited liability (general) partnership and eliminating partially or completely the automatic personal liability of each partner for each partnership obligation.

A limited liability limited partnership:

- is a limited partnership that has invoked the limited liability limited partnership provisions of its state partnership law
- by filing with a specified public official a specified document
- thereby becoming a limited liability limited partnership and eliminating completely the automatic personal liability of each general partner for each partnership obligation and, under most statutes, also eliminating the "control rule" liability exposure for all limited partners.

The term "limited liability limited partnership" is abbreviated as LLLP and, except in statutory provisions, the abbreviation is used far more often than the term itself. The abbreviation is usually pronounced "triple-L-P".

The Current Landscape

(The Dominance of LLCs, the Question of Corpufuscation, the Influence of Delaware)

note to translator-corpufuscation is a made-up word, a mixture of "corporate" and "obfuscation"

In 2007, in the U. S. world of non-publicly traded entities:

- unincorporated business organizations predominate over corporations, and
- limited liability companies dominate the world of unincorporated business organizations.

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① These states include Alabama, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, and Virginia. The National Conference of Commissioners on Uniform State Laws, http: //www. nccusl. org/Update/uniformact_factsheets/uniformacts-fs-ulpa. asp (last visited Sept. 8, 2007) .

For example, the latest annual report from the International Association of Corporate Administrators includes the following data on entities formed in 2006:

Table 1①

State	Business Corporations	LLCs	LLPs	Limited Partnerships	LLLPs
Arizona	12, 366	48, 345	188	699	253
California	96, 278	61, 911	419	4, 033	n/a
Delaware	33, 449	97, 508	114	9, 901	139
Florida	157, 310	123, 055	492	1, 543	(see note[A])
New Jersey	18, 819	52, 344	483	301	n/a
New York	76, 474	48, 451	319	560	n/a
Oregon	8, 243	22, 629	85	214	n/a
Texas	36, 473	58, 288	5, 310	16, 355	n/a
Washington	12, 524	30, 457	121	300	n/a

[A] Figure for limited partnerships includes LLLPs.

Even in states in which new corporate formations still outnumber LLC formations, the trend is toward LLCs:

Table 2②

State	Corporate Formations 2005	Corporate Formations 2006	LLC Formations 2005	LLC Formations 2006
California	97, 432	96, 278	59, 431	61, 911
Florida	168, 182	157, 310	123, 437	123, 055
New York	76, 999	76, 474	48, 564	48, 451

Ironically, as the limited liability company has increased in prominence, LLC law has become increasingly subject to corporate concepts and legal doctrines. ③Some have criticized this influence as "conceptual miscegenation"—a "corpufuscation" foreign to "the practice, philosophy and law

① International Association of Commercial Administrators, http: //www. iaca. org/downloads/AnnualReports/2007_IACA_AR. pdf (last visited Sept. 8, 2007).

② International Association of Commercial Administrators, http: //www. iaca. org/downloads/AnnualReports/2007_IACA_AR. pdf (last visited Sept. 8, 2007).

③ For a recent example, see In re Mooney, Bankruptcy No. 05-13392-JMD, Adversary No. 05-1205-JMD, 2007 WL 2403774, at * 2 (Bankr. D. N. H. Aug. 17, 2007) (assuming that Massachusetts courts would apply to LLCs the same rules as for corporations with regard to managers' duties to creditors and the doctrine of piercing the veil).