THE UNTESTED SHIELD: PIERCING THE VEIL OF NONPROFIT CORPORATIONS

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INTRODUCTION

Nonprofit corporations serve a distinct role in Texas by providing critical charitable services. In deciding whether and how to apply veil piercing to nonprofit corporations, Texas courts must strike a fine balance between preventing abuse of the corporate liability shield and discouraging people from volunteering with nonprofit corporations to avoid excessive risks of liability. Texas courts should be "loath to act like Vlad the Impaler. Indeed, the stakes are too high for courts regularly to disregard the separate legal status of [nonprofit] corporations."[1]

In 2021, the Fifth Circuit noted in *Ledford v. Keen* that whether the equitable remedy of veil piercing operates on a nonprofit corporation remains an open question under Texas law.[2] As of October 1, 2022, approximately 170,080 domestic nonprofit corporations existed in Texas.[3] This unresolved issue has created a looming specter of potential liability for the governing persons of Texas nonprofit corporations.

Despite the lack of clarity on whether veil piercing applies to nonprofit corporations, Texas possesses a well-developed body of case law on its application to for-profit corporations and limited liability companies.[4] These

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[1] Doe v. Gelineau, 732 A.2d 43, 44 (R.I. 1999).

[2] 9 F.4th 335, 341 n.10 (5th Cir. 2021) (declining to decide "whether veil-piercing may operate against a non-profit corporation, an open question under Texas law" because Ledford's evidence was insufficient to support veil piercing).

[3] CORPS. SECTION, OFF. OF THE SEC'Y OF STATE, MASTER FILE STATISTICS FOR 10/01/2022 (2022).

[4] *See, e.g.*, Castleberry v. Branscum, 721 S.W.2d 270, 271–73 (Tex. 1986), *superseded by statute*, Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 974 (amended 1993, 1997) (expired Jan. 1, 2010), *as recognized in* SSP Partners v. Gladstrong Invs. (USA) Corp.,

precedents serve as sources of information for the doctrine in the nonprofit context.[5]

This article provides much-needed guidance on the issue of applying veil piercing to nonprofit corporations. First, this article in Part II clarifies that Sections 21.223 and 101.002 of the Texas Business Organizations Code (Code) do not preclude the application of veil piercing to nonprofit corporations but rather express the Texas Legislature's policy judgments to limit the impact of *Castleberry v. Branscum*.[6] Then, the article in Part III proposes that Texas courts should apply veil piercing to nonprofit corporations as an equitable remedy in a narrowly tailored fashion to prevent abuse of the entity's limited liability status.[7] Finally, the article in Part IV advances that veil piercing may operate on nonprofit corporations in matters relating to and arising out of contractual obligations using standards analogous to Sections 21.223 and 101.002 of the Code out of deference to the Texas Legislature's policy judgments.[8]

I. BACKGROUND

A. Law Addressing Whether Veil Piercing Operates on Texas Nonprofit Corporations

The Code is silent about whether veil piercing operates on a nonprofit corporation. However, Section 22.152 of the Code, which governs the liability of members of a nonprofit corporation, states that "[t]he members of a corporation are not personally liable for a debt, liability, or obligation of the corporation."[9]

275 S.W.3d 444, 455 (Tex. 2008); Shook v. Walden, 368 S.W.3d 604, 612–14 (Tex. App.—Austin 2012, pet. denied).

[5] *See infra* Section IV.A.

[6] *See infra* Part II; TEX. BUS. ORGS. CODE §§ 21.223, 101.002; *Castleberry*, 721 S.W.2d 270.

[7] *See infra* Part III.

[8] *See infra* Part IV; TEX. BUS. ORGS. CODE §§ 21.223, 101.002.

[9] TEX. BUS. ORGS. CODE § 22.152. This statute mirrors its counterpart for limited liability companies before and since the Texas Legislature passed Section 101.002 of the Code. *See id.* § 101.114 ("Except as and to the extent the company agreement specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including a debt, obligation, or liability under a judgment, decree, or order of a court."). Yet, Texas courts still applied veil piercing to limited liability companies without statutory guidance before 2011. *See, e.g.*, McCarthy v. Wani Venture, A.S., 251 S.W.3d 573, 591 (Tex. App.—Houston [1st

Four cases have raised the question of whether veil piercing can operate on Texas nonprofit corporations; only one has attempted to answer it. First, in 1985, the appellees in *Presidio Valley Farmers Ass'n v. Brock* argued that veil piercing applied to a nonprofit corporation based on the theory that the corporate form was a "sham."[10] However, the Fifth Circuit rejected this argument as the appellees failed to prove the theory via pleadings, evidence, or trial by consent.[11] Then, in 1996, the appellees in *Elliott v. Tilton* raised the argument that veil piercing applies to a nonprofit corporation through a constructive fraud theory.[12] However, the Fifth Circuit again declined to consider the issue as the appellees failed to preserve it properly for appeal.[13] The question was not raised again for over two decades.

In 2020, the United States District Court in Waco was the first court to directly address whether veil piercing applies to a nonprofit corporation.[14] In *Ledford v. Kosse Roping Club*, a barrel racing horse struck Karen Ledford while she was crossing an alleyway to pick up her niece.[15] In her suit against Kosse Roping Club, a Texas nonprofit corporation, Ledford sought to pierce the nonprofit corporation's veil to hold its board of directors personally liable.[16] The court noted that "veil piercing has never been applied to a nonprofit corporation in Texas," and that the Texas Legislature "codified" veil piercing to apply to for-profit corporations, but not to nonprofit corporations.[17] Citing a canon of statutory construction that "[t]he Legislature is presumed to act intentionally and purposefully when it includes language in one section but omits it in another," the court stated in dicta that "[i]t is reasonable to believe" that the Legislature intended to apply veil piercing to for-profit corporations, but not to nonprofit corporations.[18] Ultimately

Dist.] 2007, pet. denied); Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 500 (Tex. App.—Texarkana 2002, pet. denied).

[10] 765 F.2d 1353, 1357–58 (5th Cir. 1985).

[11] *Id.* at 1358.

[12] 89 F.3d 260, 264 (5th Cir. 1996).

[13] *Id.*

[14] Ledford v. Kosse Roping Club, No. 6-18-CV-00371-ADA, 2020 WL 1903917, at *5–6 (W.D. Tex. Mar. 16, 2020).

[15] Appellant's Brief on the Merits at viii, Ledford v. Keen, 9 F.4th 335 (5th Cir. 2021) (No. 20-50650).

[16] *Kosse Roping Club*, 2020 WL 1903917, at *5.

[17] *Id.*

[18] *Id.*

though, the court decided the issue on other grounds.[19] In 2021, the Fifth Circuit affirmed *Kosse Roping Club* in *Ledford v. Keen* and noted that "whether veil-piercing may operate against a non-profit corporation" is "an open question under Texas law."[20]

B. A Brief History of Veil Piercing in Texas

Before 1986, Texas courts distinguished veil piercing based on whether the underlying cause of action was a tort or breach of contract claim.[21] In tort cases, courts did not require a finding of intent to defraud.[22] Instead, Texas courts focused on the financial strength or weakness of the corporation.[23] This treatment reflected the rationale that "[a]n inadequately capitalized corporation in a risky business in effect transfers the risk of loss to innocent members of the general public."[24] Conversely, in a breach of contract case, Texas courts applied veil piercing based specifically on a showing of deception or fraud.[25] This stance reflected the rationale that the plaintiff had prior dealings with the parent corporation in a contract case and the risk of loss is apportioned by virtue of relative bargaining power.[26]

In 1986, the Supreme Court of Texas decided the seminal case *Castleberry v. Branscum*, adopting a particularly liberal application of veil piercing.[27] The Supreme Court identified at least six independent bases that could support veil piercing: (1) when the fiction is used as a means of perpetrating a fraud; (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation; (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation; (4) where the corporate fiction is employed to achieve or perpetrate monopoly; (5) where the corporate fiction is used to circumvent a statute; and

[19] *Id.* at *6 (holding that "even if Plaintiff was legally authorized to pierce the corporate veil, her allegations [of lack of insurance and undercapitalization] are legally insufficient to do so as a matter of law").

[20] *Id.*; *Keen*, 9 F.4th at 341 n.10.

[21] *See, e.g.*, Lucas v. Tex. Indus., Inc., 696 S.W.2d 372, 375 (Tex. 1984).

[22] *Id.*

[23] *E.g.*, Gentry v. Credit Plan Corp. of Hous., 528 S.W.2d 571, 573 (Tex. 1975).

[24] *Lucas*, 696 S.W.2d at 375 (quoting 19 Robert W. Hamilton, *Texas Practice Series: Business Organizations* § 234, at 230 (1973)).

[25] *Id.*

[26] *Id.*

[27] 721 S.W.2d 270 (Tex. 1986), *superseded by statute*, Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 974 (amended 1993, 1997) (expired Jan. 1, 2010).

(6) where the corporate fiction is relied upon as protection of crime or to justify wrong.[28] The court created a "flexible fact-specific approach focusing on equity" that abolished the prior distinction between tort and contract claims.[29] After *Castleberry*, constructive fraud, which is "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests," was sufficient to constitute a sham to perpetrate a fraud.[30] Additionally, the court determined that the question of when to pierce the corporate veil was a question of fact for a jury.[31] This system created significant confusion and unpredictability in the law surrounding veil piercing.[32]

In the years following *Castleberry*, the Texas Legislature amended Article 2.21 of the Texas Business Corporation Act (now recodified in Section 21.223 of the Code).[33] These amendments restricted piercing the corporate veil in the context of matters related to or arising out of contractual obligations of a for-profit corporation by eliminating constructive fraud as a basis for veil piercing.[34] The current iteration of Section 21.223 outlines limitations on veil piercing of for-profit corporations:

> A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to . . . any contractual obligation of the corporation or any matter relating to or

[28] *Id.* at 272. The Supreme Court of Texas also listed inadequate capitalization as another potential basis in a footnote, but many courts have declined to recognize inadequate capitalization as an independent basis for veil piercing. *Id.* at 272 n.3; *see, e.g.*, Ledford v. Keen, 9 F.4th 335, 339–40 (5th Cir. 2021) ("[W]e think the Texas Supreme Court would not conclude that undercapitalization alone justifies piercing the corporate veil.").

[29] *Castleberry*, 721 S.W.2d at 273.

[30] *Id.*

[31] *See id.*

[32] *See, e.g.*, Rosen v. Matthews Constr. Co., 777 S.W.2d 434, 437–38 (Tex. App.—Houston [14th Dist.] 1989) ("[T]he whole need for a doctrine of constructive fraud rests on the lack of a well-defined common law tort to cover the conduct at hand. The best the supreme court has been able to do is to remark that 'constructive fraud is the breach of some legal or equitable duty.'" (quoting *Castleberry*, 721 S.W.2d at 273)), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990).

[33] *See* Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 974, 974–75 (amended 1993, 1997) (expired Jan. 1, 2010).

[34] *See id.*

> arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory . . . . [This section] does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the obligee demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.[35]

C. Governing Persons of a Texas Nonprofit Corporation

Directly substituting the members of a nonprofit corporation for the shareholders of a for-profit corporation for the purposes of veil piercing is inappropriate because a nonprofit may exist without any members.[36] Donors, contributors, and clientele of a nonprofit corporation are not necessarily members of the entity.[37] Further, members of a nonprofit corporation lack many of the critical characteristics of shareholders of a for-profit corporation.[38] By default, the members of a nonprofit corporation play no role in electing the board of directors and do not receive any assets upon liquidation of the nonprofit corporation.[39] Additionally, the members of nonprofit corporations may not receive any distribution of income, with some exceptions such as reasonable compensation.[40]

Courts look to substance over form in determining whether to apply the equitable remedy of veil piercing.[41] For example, in *Macaluso v. Jenkins*, an Illinois court rejected the argument that veil piercing could not apply to a nonprofit corporation simply because the nonprofit corporation possessed no

[35] TEX. BUS. ORGS. CODE § 21.223(a), (b).

[36] *See id.* § 22.151(a).

[37] *See id.* § 1.002(53)(B) (defining a "member" as, "in the case of a nonprofit corporation, a person who has membership rights in the nonprofit corporation under its governing documents").

[38] *See id.* § 22.001(5) ("'Nonprofit corporation' means a corporation no part of the income of which is distributable to a member, director, or officer of the corporation . . . .").

[39] *See id.* §§ 22.206–.304.

[40] *Id.* §§ 22.053–.054.

[41] *See, e.g.*, Macaluso v. Jenkins, 420 N.E.2d 251, 255 (Ill. App. Ct. 1981).

shareholders.[42] The court instead analyzed whether the appellee exercised "ownership control" over the nonprofit corporation.[43] In particular, the court emphasized that the evidence showed that the appellee, who was an officer and member of the board of directors, "made most or all of the decisions" for the nonprofit corporation.[44]

Governing persons, as defined by the Code, present an appropriate substitute for shareholders when piercing the corporate veil of nonprofit corporations.[45] A governing person is a member of the governing authority, which is "a person or group of persons who are entitled to manage and direct the affairs of an entity under th[e] [C]ode and the governing documents of the entity."[46] By default, the governing authority of a nonprofit corporation is its board of directors; however, the nonprofit corporation's certificate of formation may name the members as the governing authority.[47] Additionally, the bylaws or certificate of formation of a nonprofit corporation with a board of directors may limit the authority of the board of directors.[48] Governing persons exercise the equivalent of "ownership control" in nonprofit corporations because these individuals possess a role in the management and direction of the affairs of nonprofit corporations.[49]

II. TEXAS BUSINESS ORGANIZATIONS CODE'S LIMITATIONS ON VEIL PIERCING DO NOT PRECLUDE THE APPLICATION OF VEIL PIERCING TO NONPROFIT CORPORATIONS

Contrary to dicta in *Ledford v. Kosse Roping Club*, the Legislature's limitation of veil piercing to for-profit corporations (and limited liability companies) does not preclude the application of veil piercing to nonprofit

[42] *See id.*

[43] *Id.* The court also considered that the evidence demonstrated that the appellee "intended to profit" from the nonprofit corporation. *Id.* at 255–56.

[44] *Id.* See *infra* Section III.0 for discussion of the outcome of this case.

[45] *See* TEX. BUS. ORGS. CODE § 1.002(37).

[46] *Id.* § 1.002(35)(A). Further, if an entity's governing documents or the Code divides the authority to manage or direct the affairs of the entity among different persons or groups of persons according to different matters, then governing authority means "the person or group of persons entitled to manage and direct the affairs of the entity with respect to a matter under the governing documents of the entity or th[e] [C]ode." *Id.* However, the governing authority of an entity does not include an officer acting in his or her capacity as such. *Id.* § 1.002(35)(B).

[47] *Id.* §§ 22.201–.202(a).

[48] *Id.* § 22.202(a).

[49] *See Macaluso*, 420 N.E.2d at 255.

corporations.[50] The Legislature's failure to include limits on veil piercing in Chapter 22 of the Code, which governs nonprofit corporations, creates a much narrower inference. Rather, the legislative history of the Code supports the position that the Legislature has not yet chosen to place any restrictions on the operation of veil piercing on nonprofit corporations.

A. The Texas Legislature Only Limited the Operation of Veil Piercing on For-Profit Corporations to Contain the Impact of Castleberry v. Branscum

The statutory restrictions on veil piercing for-profit corporations only create a set of circumstances in which veil piercing may *not* apply; it is not an authorization of when veil piercing does apply. Indeed, the plain language of Section 21.223(a) of the Code creates an enumerated list containing two statutory limitations on veil piercing of for-profit corporations.[51] Outside of the two statutory limitations, Texas courts continue to apply the principles of *Castleberry v. Branscum*.[52]

The Texas Legislature amended Article 2.21 of the Texas Business Corporation Act in 1989 to achieve one goal: undoing the effects of *Castleberry*. When the Texas Legislature amended Article 2.21, the legislative history behind the Article 2.21 amendments reflected this goal.[53] The House Research Organization's bill analysis of the 1989 amendments to Article 2.21 states that the amendments "would simply restate the law as it stood before the *Castleberry* decision" and that "[t]he Legislature should not hesitate to assert its own views of public policy."[54] Likewise, various

[50] *See infra* Section II.C (discussing how the Legislature's silence on whether veil piercing limitations apply to nonprofit corporations does not preclude the application of the doctrine to nonprofit corporations).

[51] *See* TEX. BUS. ORGS. CODE § 21.223(a)(2), (3).

[52] *See, e.g.*, McCarthy v. Wani Venture, A.S., 251 S.W.3d 573, 591 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 499–500 (Tex. App.—Texarkana 2002, pet. denied).

[53] *See* H. Rsch. Org., Bill Analysis, Tex. S.B. 1427, 71st Leg., R.S. (1989).

[54] *Id.* at 2. Both the Texas Senate Committee on Jurisprudence's bill analysis and the Texas House Committee on Business and Commerce's bill analysis of the 1989 amendments are neutral and only describe the bare facts of the proposed changes. *See* S. Comm. on Juris., Bill Analysis, Tex. S.B. 1427, 71st Leg., R.S. (1989); H. Comm. on Bus. & Com., Bill Analysis, Tex. S.B. 1427, 71st Leg., R.S. (1989).

commentators recognize that the amendments to Article 2.21 occurred as a direct response to *Castleberry*.[55]

Later amendments to Article 2.21 in 1993 and 1997 occurred for similar purposes. The 1993 amendments "were designed to close loopholes in Article 2.21 that courts had been using to apply Castleberry despite the 1989 amendments."[56] And the 1997 amendments occurred to expand the scope of Article 2.21.[57]

Applying canons of construction to Section 21.223(a) demonstrates that the section's enumerated list only limits veil piercing in certain contexts. The usage of the phrase "may not" in Section 21.223(a)— "a holder of shares, an owner of any beneficial interest in shares . . . *may not* be held liable to the corporation or its obligees with respect to . . ."[58]— creates a set of circumstances outside of which shareholders generally do not have liability to the corporation or the corporation's obligees.[59] Additionally, the inclusion

[55] Two commentators explained:

> In response to the Texas Supreme Court's decision in *Castleberry v. Branscum* and its progeny, such as the Dallas court of appeals decision in *Speed v. Eluma International, Inc.*, the Texas Legislature passed a bill during the last regular session that eliminated failure to observe corporate formalities, constructive fraud, and 'sham to perpetrate a fraud' as bases for shareholder liability for the contractual obligations of the corporation.

Robert F. Gray, Jr. & Gregory J. Sergesketter, *Annual Survey of Texas Law: Corporations*, 44 SW. L.J. 225, 226 (1990). *See also* 20 Elizabeth S. Miller & Robert A. Ragazzo, *Texas Practice Series, Business Organizations* § 29:4 (3d ed.), Westlaw (database updated Dec. 2022) ("Effective August 28, 1989, Article 2.21 of the Texas Business Corporation Act was amended in an effort to address the problems created by Castleberry.").

[56] Miller & Ragazzo, *supra* note 55, § 29:4. The legislative history of the 1993 amendments to Article 2.21 does not reflect any particular view on the changes and was overshadowed by the discussion surrounding large changes to the Limited Liability Company Act in the same bill. *See* H. Rsch. Org., Bill Analysis, Tex. H.B. 1239, 73d Leg., R.S. (1993); S. Comm. on Juris., Bill Analysis, Tex. H.B. 1239, 73d Leg., R.S. (1993); H. Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 1239, 73d Leg., R.S. (1993).

[57] Miller & Ragazzo, *supra* note 55, § 29:4. The legislative history of the 1997 amendments notes that the bill as a whole would implement suggestions of the Corporation Law Committee of the Business Law Section of the State Bar. *See* H. Rsch. Org., Bill Analysis, Tex. H.B. 1104, 75th Leg., R.S. (1997); H. Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 1104, 75th Leg., R.S. (1997).

[58] TEX. BUS. ORGS. CODE § 21.223(a) (emphasis added).

[59] *See id.*; TEX. GOV'T CODE § 311.016(5) ("'May not' imposes a prohibition . . . ."). However, other laws impose liability upon a corporation's shareholders in certain circumstances, such as under the Texas Uniform Fraudulent Transfers Act. *See, e.g.*, TEX. BUS. & COM. CODE §§ 24.005(a), .006, .008.

of the word "and" in the list of limitations creates a conjunctive list of when shareholders are not liable to the corporation or the corporation's obligees.[60]

The canon of construction "expressio unius est exclusio alterius" applies to this list, making the list exclusive.[61] "Expressio unius est exclusio alterius" means that the inclusion of specific limitations excludes all others,[62] and the three specified limitations constitute a list of when shareholders generally are not liable to the corporation or the corporation's obligees.[63] Therefore, Section 21.223(a) creates a limited set of circumstances in which veil piercing cannot operate, rather than constituting a codification of when veil piercing can operate.[64]

The first limitation on veil piercing in Section 21.223(a) only applies in matters relating to or arising out of contractual obligations.[65] This limitation works in conjunction with Section 21.223(b) to only allow veil piercing in this context if the wrongdoer "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of" the wrongdoer.[66] Texas courts have held that actual fraud involves "dishonesty of purpose or intent to deceive" and is "characterized by deliberately misleading conduct."[67] Therefore, this limitation has the effect of rejecting the use of constructive fraud in veil piercing in matters relating to or arising out of contractual obligations.[68]

The second limitation on veil piercing in Section 21.223(a) prevents the application of the doctrine on the basis of the corporation's failure to follow

[60] *See* TEX. BUS. ORGS. CODE § 21.223(a); *In re* Brookshire Grocery Co., 250 S.W.3d 66, 69 (Tex. 2008) (citing Bd. of Ins. Comm'rs of Tex. v. Guardian Life Ins. Co. of Tex., 180 S.W.2d 906, 908 (Tex. 1944)).

[61] *See* Brookshire v. Hous. Indep. Sch. Dist., 508 S.W.2d 675, 679 (Tex. App.—Houston [14th Dist.] 1974, no writ); Harris Cnty. v. Crooker, 248 S.W. 652, 655 (Tex. 1923).

[62] *Brookshire*, 508 S.W.2d at 679; *Crooker*, 248 S.W. at 655.

[63] *See* TEX. BUS. ORGS. CODE § 21.223(a); TEX. GOV'T CODE § 311.016(5).

[64] *See Brookshire*, 508 S.W.2d at 679; *Crooker*, 248 S.W. at 655; TEX. BUS. ORGS. CODE § 21.223(a). The first limitation in Section 21.223(a) is not a restriction on veil piercing, but rather codifies the limited liability nature of a for-profit corporation. *See id.* § 21.223(a)(1).

[65] TEX. BUS. ORGS. CODE § 21.223(a)(2).

[66] *Id.* § 21.223(b).

[67] Belliveau v. Barco, Inc., 987 F.3d 122, 129 (5th Cir. 2021) (first quoting *In re* Ritz, 832 F.3d 560, 566 (5th Cir. 2016); and then quoting Shook v. Walden, 368 S.W.3d 604, 620 (Tex. App.—Austin 2012, pet. denied)).

[68] *See* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008).

any corporate formality.[69] Texas courts have interpreted this limitation to mean that a "[f]ailure to comply with corporate formalities is no longer a factor in considering whether alter ego exists."[70]

The overall effect of Section 21.223 is to retain the constructive fraud standard from *Castleberry* only within pure tort claims.[71]

B. Prior Application of Veil Piercing to Limited Liability Companies Demonstrates That the Texas Legislature Did Not Intend to Preclude the Application of the Doctrine to Other Entities Without Statutory Authorization

Before the 2011 enactment of Section 101.002 of the Code, Texas courts applied veil piercing to limited liability companies without any statutory guidance.[72] Section 101.114 of the Code specifies that "[e]xcept as and to the extent the company agreement [of the limited liability company] specifically provides otherwise, a member or manager is not liable for a debt, obligation, or liability of a limited liability company, including . . . under a judgment, decree, or order of a court."[73] The Texas Limited Liability Act was otherwise silent regarding the personal liability of members or managers of a limited liability company. This prior practice demonstrates that the Legislature's silence as to veil piercing for a type of entity does not preclude the doctrine's application.

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[69] TEX. BUS. ORGS. CODE § 21.223(a)(3).

[70] *E.g.*, Hoffmann v. Dandurand, 180 S.W.3d 340, 347 (Tex. App.—Dallas 2005, no pet.).

[71] *See* Ledford v. Keen, 9 F.4th 335, 339 n.5 (5th Cir. 2021) ("But those amendments are not relevant here because they 'left untouched' the 'constructive fraud' standard for tort claims." (quoting Farr v. Sun World Sav. Ass'n, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ))); *see also* TecLogistics, Inc. v. Dresser-Rand Grp., 527 S.W.3d 589, 597 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

[72] *See, e.g.*, Sanchez v. Mulvaney, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.) (holding that the corporation is a "limited liability corporation to which state law principles for piercing the corporate veil apply").

[73] TEX. BUS. ORGS. CODE § 101.114. Prior to recodification into the Code, the predecessor to this statute was Article 4.03 of the Texas Limited Liability Company Act. *See* Texas Limited Liability Act, 72d Leg., R.S., ch. 901, § 46, sec. 4.03(A), 1991 Tex. Gen. Laws 3192, 3203 (expired Jan. 1, 2010) ("Except as and to the extent the regulations specifically provide otherwise, a member or manager is not liable for the debts, obligations or liabilities of a limited liability company including under a judgment decree, or order of a court."). These counterpart statutes were substantially the same. *See* Shook v. Walden, 368 S.W.3d 604, 613 (Tex. App.—Austin 2012, pet. denied).

In the absence of statutory guidance, Texas had developed a sizable body of case law regarding the application of veil piercing to limited liability companies. Texas courts applied corporate veil piercing to limited liability companies as an equitable remedy when "the corporate form has been used as part of an unfair device to achieve an inequitable result."[74] Additionally, in *McCarthy v. Wani Venture, A.S.*, the court rejected the argument that statutory silence precluded disregarding the corporate veil of limited liability companies because of existing precedent and the need to prevent inequitable results.[75] However, significant confusion still existed, especially in out-of-state courts applying Texas law, over the applicable standards for the veil piercing of a limited liability company.[76]

In 2011, the Texas Legislature passed Section 101.002 to carry over the same limitations on veil piercing of a for-profit corporation to limited liability companies.[77] This addition occurred as a reaction to *Taurus IP, LLC v. DaimlerChrysler Corporation* and *21X Capital Ltd. v. Werra* and was meant to prevent the application of *Castleberry* principles to limited liability companies without any limitation.[78] Thus, the Legislature passed Section

[74] *See, e.g.*, McCarthy v. Wani Venture, A.S., 251 S.W.3d 573, 591 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487, 499 (Tex. App.—Texarkana 2002, pet. denied); Penhollow Custom Homes, LLC v. Kim, 320 S.W.3d 366, 372–74 (Tex. App.—El Paso 2010, no pet.); *Sanchez*, 274 S.W.3d at 712; Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd., 237 S.W.3d 379, 387 (Tex. App.—Houston [14th Dist.] 2007, no pet.); Morris v. Powell, 150 S.W.3d 212, 219 (Tex. App.—San Antonio 2004, no pet.); Phillips v. B.R. Brick & Masonry, Inc., No. 01-09-00311-CV, 2010 WL 3564820, at *7–10, *7 n.6 (Tex. App.—Houston [1st Dist.] Sept. 10, 2010, no pet.) (mem. op.). This article discusses *Shook v. Walden*, which contained a thorough analysis of why corporate veil piercing principles should apply to limited liability companies, in Part IV. 368 S.W.3d 604; *see infra* Section IV.A.

[75] 251 S.W.3d at 590–91.

[76] *See* Taurus IP, LLC v. DaimlerChrysler Corp., 534 F. Supp. 2d 849, 871 (W.D. Wis. 2008) ("However, they overstate the scope of the statute slightly; it limits alter ego liability only for shareholders, owners, subscribers and affiliates, not directors, officers, managers or members."); 21X Capital Ltd. v. Werra, No. C06-04135 JW, 2008 WL 11387039, at *2–3 (N.D. Cal. Sept. 15, 2008) ("Accordingly, the Court finds that where, as here, Defendants were a member and a managing member of a LLC, alter ego liability is not restricted by the statutory requirement of TBCA Art. 2.21.").

[77] Act of Apr. 20, 2011, 82d Leg., R.S., ch. 25, § 2, 2011 Tex. Gen. Laws 45, 45 (current version at TEX. BUS. ORGS. CODE § 101.002).

[78] As the House Research Organization's bill analysis explained:

> Two out-of-state courts recently held that the liability shield for an LLC is less protective than that of a for-profit corporation. These rulings are of serious concern for the

101.002 not as statutory authorization for veil piercing a limited liability company, but rather to carry over limitations from the corporate context.[79]

C. The Texas Legislature's Silence in Chapter 22 of the Texas Business Organizations Code Does Not Preclude the Operation of Veil Piercing on Nonprofit Corporations

Contrary to the dicta in *Ledford v. Kosse Roping Club*, statutory silence alone does not indicate that veil piercing may not operate on a nonprofit corporation. When the Texas Legislature "includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended."[80] Applying this canon of construction to the Legislature's silence on veil piercing of a nonprofit corporation, however,

> thousands of current Texas LLCs and could impact the decisions of prospective businesses weighing whether to move to Texas. Texas case law has supported the alternative position, that state law principles for piercing the corporate veil of corporations should be applied to LLCs. HB 521 would clarify in the statute that the standards for piercing the liability shield of a corporation apply equally to an LLC.

See H. Rsch. Org., Bill Analysis, Tex. H.B. 521, 82d Leg., R.S. (2011). Likewise, the Senate Committee on Business & Commerce wrote:

> In *Taurus IP, LLC v. DaimlerChrysler Corp.*, the U.S. District Court for the Western District of Wisconsin held that, because a 2005 amendment to the Texas Business Organization Code relating to the liability shield of a corporation did not specifically state that it applied to LLCs, it does not apply to LLCs. Relying on that ruling, the U.S. District Court for the Northern District of California made a similar ruling.

S. Comm. on Bus. & Com., Bill Analysis, Tex. S.B. 323, 82d Leg., R.S. (2011). The House Committee on Business & Industry made a similar point:

> Provisions of the Business Organizations Code establish that a member or manager of a Texas limited liability company (LLC) is not liable for the obligations of the LLC. These provisions currently do not state explicitly that a member or manager of an LLC is entitled to the same level of liability protection as an owner of a corporation, and the Texas Supreme Court has not taken up this question. Two out-of-state courts recently held that the liability shield for an LLC is less protective than that of a for-profit corporation. These rulings are of serious concern for the thousands of current Texas LLCs and could impact the decision of prospective businesses interested in moving to Texas.

H. Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 521, 82d Leg., R.S. (2011).

[79] *See* H. Rsch. Org., Bill Analysis, Tex. H.B. 521, 82d Leg., R.S. (2011); S. Comm. on Bus. & Com., Bill Analysis, Tex. S.B. 323, 82d Leg., R.S. (2011); H. Comm. on Bus. & Indus., Bill Analysis, Tex. H.B. 521, 82d Leg., R.S. (2011).

[80] PPG Indus., Inc. v. JMB/Hous. Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 84 (Tex. 2004).

leads to a contrary result. The Legislature created Sections 21.223 and 101.002 of the Code to prohibit the unrestricted application of veil piercing (under existing case law) to for-profit corporations and limited liability companies.[81] Therefore, a reasonable conclusion of the Legislature's intent, based upon these provisions, is that the Legislature did not intend to extend these same limitations on veil piercing to nonprofit corporations.

Legislative intent should be the ultimate guide for interpreting the meaning of legislative silence.[82] This canon of construction—when the Legislature "includes a right or remedy in one part of a code but omits it in another, that may be precisely what the Legislature intended"—is merely an aid to determine legislative intent, not an absolute rule.[83] As previously discussed, Section 22.152 of the Code governs the limited liability protections of members of a nonprofit corporation.[84] Notably, this section does not discuss veil piercing in any capacity. Additionally, this section traces its origins to Article 2.08E of the Texas Nonprofit Corporation Act, which has contained the same language since 1961.[85] Therefore, the current text precedes the Texas Legislature's first limitation on veil piercing by twenty-seven years.[86] No authority suggests the Legislature considered this article in the context of veil piercing. The sole case to consider veil piercing in the context of Article 2.08E rejected the argument on procedural grounds.[87] Although the Fifth Circuit acknowledged this theory as appellants' "only theory for joint and several liability that has arguable merit," the court refused to hear this argument because the appellants failed to raise the theory at trial by pleadings and evidence to support the theory or trial by consent.[88] No changes occurred in the transition from Article 2.08E to Section 22.152 with

[81] *See supra* Sections II.A–B.

[82] *See* Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 895 (Tex. 2000) (holding that the petitioner's argument that the Texas Legislature's failure to include punitive damages in the specific exclusion of certain damages in a statutory cap does not give rise to the inference that the Legislature intended to include punitive damages within the cap).

[83] *PPG Indus., Inc.*, 146 S.W.3d at 84; *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 895; Mid-Century Ins. Co. of Tex. v. Kidd, 997 S.W.2d 265, 274 (Tex. 1999).

[84] TEX. BUS. ORGS. CODE § 22.152.

[85] Texas Non-Profit Corporation Act, 57th Leg., R.S., ch. 302, art. 2.08, 1961 Tex. Gen. Laws 653, 653 (expired Jan. 1, 2010).

[86] *See* Act of May 12, 1989, 71st Leg., R.S., ch. 216, § 1, 1989 Tex. Gen. Laws 974, 974–75 (amended 1993, 1997, 2003, 2007) (expired Jan. 1, 2010) (former TEX. BUS. CORP. ACT art. 2.21).

[87] *See* Presidio Valley Farmers Ass'n v. Brock, 765 F.2d 1353, 1358 (5th Cir. 1985).

[88] *Id.*

the advent of the Code.[89] Therefore, the legislative intent behind Section 22.152 is inconclusive.

The Texas Legislature rejected applying restrictions on veil piercing analogous to those in Section 21.223 to all entities under a proposed version of what ultimately became the Code.[90] An ad hoc committee of the Business Law Section of the State Bar of Texas drafted the Code to codify all variations of Texas business entities within a single, unified code.[91] In 2001, the Legislature rejected what would have been Sections 7.002 and 7.004 of the Code, which stated in relevant part the following:

> Except as otherwise provided . . . an owner, member, subscriber, or affiliate of a domestic entity shall be under no obligation to the domestic entity or to its obligees with respect to any contractual obligation of the domestic entity respect to any contractual obligation of the domestic entity or any matter relating to or arising from a contractual obligation on the basis: (1) that the owner, member, subscriber, or affiliate is or was the alter ego of the domestic entity; (2) of an actual or constructive fraud or a sham to perpetrate a fraud; or (3) of any other similar theory. . . . [unless] the obligee demonstrates that the owner, member, subscriber, or affiliate caused the domestic entity to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the owner, member, subscriber, or affiliate . . . .[92]

These sections would have extended standards analogous to Section 21.223 to nonprofit corporations. Under this early version of the Code, a nonprofit corporation was still considered a domestic entity.[93]

Significant controversy arose surrounding these proposed changes at the House Committee of Business and Industry hearing on March 20, 2001.[94] A representative of the Texas Trial Lawyers Association took issue with these

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[89] *See* TEX. BUS. ORGS. CODE § 22.152.

[90] Miller & Ragazzo, *supra* note 55, § 2:7.

[91] *Id.* § 2:6; *see generally* Thomas F. Blackwell, *The Revolution is Here: The Promise of a Unified Business Entity Code*, 24 J. CORP. L. 333 (1999).

[92] Tex. H.B. 327, 77th Leg., R.S., §§ 7.002(a), .004 (2001).

[93] *See id.* §§ 1.002(21), 22.051.

[94] *Hearing on H.B. 327 Before the H. Comm. of Bus. & Indus.*, 77th Leg., R.S. (March 20, 2001) [hereinafter *House Hearing on Tex. H.B. 327*]; Miller & Ragazzo, *supra* note 55, § 2:7.

sections because the changes would impose substantive, pro-defendant changes to the law.[95] He claimed that these changes would increase a plaintiff's burden of proof when attempting to recover against shell companies.[96] The committee considered this objection and removed the offending language to prevent any argument that the Code included substantive changes to the law.[97] Thus, Section 21.223 took its current form in Chapter 21.[98] The Legislature did not pass the Code until two years later in 2003.[99]

The House Committee of Business and Industry's decision not to include restrictions on veil piercing analogous to Section 21.223 to all entities under the Code demonstrates a legislative intent to not rigidly apply the same standards to all entities, including nonprofit corporations. Rather, the Legislature has adopted a piecemeal approach to placing restrictions on the operation of veil piercing for each particular type of entity.[100] Thus, the legislative silence surrounding veil piercing of a nonprofit corporation merely indicates that the Legislature has not yet chosen to place any restrictions on the operation of veil piercing in this context.

III. TEXAS COURTS SHOULD APPLY THE EQUITABLE REMEDY OF VEIL PIERCING TO NONPROFIT CORPORATIONS

Courts should apply veil piercing with the "goal of preventing limited liability and the entity's separate existence from being used to achieve ends that the law disfavors, expressed in terms of 'abuse,' 'injustice,' or 'inequity.'"[101] Any application of veil piercing must not "seriously compromise" the "bedrock principle" that limiting "individual liability for the [nonprofit] corporation's obligations" is a legitimate purpose for forming a nonprofit corporation.[102] Veil piercing must address "abuse[s] . . . that the

[95] *House Hearing on Tex. H.B. 327*, *supra* note 94 (statement of John David Hart, Representative, Texas Trial Lawyers Association); Miller & Ragazzo, *supra* note 55, § 2:7.

[96] *House Hearing on Tex. H.B. 327*, *supra* note 94; Miller & Ragazzo, *supra* note 55, § 2:7.

[97] *House Hearing on Tex. H.B. 327*, *supra* note 94; Miller & Ragazzo, *supra* note 55, § 2:7.

[98] Miller & Ragazzo, *supra* note 55, § 2:7.

[99] *Id.*

[100] *See supra* Sections II.A–B. The most detailed judicial analysis of the impact of TEX. BUS. ORGS. CODE § 21.223 upon veil piercing of limited liability companies occurred in *Shook v. Walden*, 368 S.W.3d 604, 619–20 (Tex. App.—Austin 2012). See *infra* Section IV.0 for discussion of this case.

[101] *Shook*, 368 S.W.3d at 619–20.

[102] SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008).

corporate structure should not shield," such as "fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like."[103]

Veil piercing of a nonprofit corporation would address a need in Texas to provide a remedy when a governing person of the nonprofit corporation takes advantage of the nonprofit's corporate form to achieve actual fraud. Additionally, Texas can look to other jurisdictions for case law regarding veil piercing of nonprofit corporations.

A. Texas's Statutory Protections for Charitable Organizations' Employees and Volunteers Indicate That Any Veil Piercing Application to Nonprofit Corporations Must Be Narrowly Tailored

Nonprofit corporations are distinct from for-profit corporations and limited liability companies due to the charitable nature of nonprofit corporations.[104] Texas recognizes that "robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services."[105] However, the charitable nature of nonprofit corporations does not preclude the application of veil piercing.

Texas provides statutory protection to charitable organizations and their employees and volunteers through Chapter 84 of the Texas Civil Practice and Remedies Code, known as the Charitable Immunity and Liability Act of 1987.[106] The express purpose of Chapter 84 is, in part, to "reduce the liability exposure . . . of these [charitable] organizations and their employees and

[103] *Id.*

[104] See *infra* Section IV.B for discussion of the interaction between Chapter 84 of the Texas Civil Practice and Remedies Code and veil piercing. This section discusses whether the charitable nature of nonprofit corporations should preclude the application of veil piercing.

[105] TEX. CIV. PRAC. & REM. CODE § 84.002(1).

[106] *See id.* §§ 84.001, .004–.005. A governing person may be either a "volunteer" or an "employee" of a nonprofit corporation. A governing person may receive reasonable compensation for services provided to the nonprofit corporation. TEX. BUS. ORGS. CODE § 22.054(1). A "volunteer" under Chapter 84 is "a person rendering services for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred. The term includes a person serving as a director, officer, trustee, or direct service volunteer, including a volunteer health care provider." TEX. CIV. PRAC. & REM. CODE § 84.003(2). An "employee" under Chapter 84 is "any person, including an officer or director, who is in the paid service of a charitable organization, but does not include an independent contractor." *Id.* § 84.003(3).

volunteers in order to encourage volunteer services and maximize the resources devoted to delivering these services."[107] Similarly, the legislative history of Chapter 84 suggests that the chapter is supposed to encourage individuals to volunteer for charitable organizations and reduce insurance costs.[108] Section 84.004 provides broad immunity from civil liability to volunteers of charitable organizations, while Section 84.005 places limits on the civil liability of employees of charitable organizations.[109]

However, Texas has not created an absolute bar on civil liability for the employees and volunteers of charitable organizations. Chapter 84 contains various exceptions limiting its protections.[110] Most notably, the entirety of Chapter 84 is inapplicable to "an act or omission that is intentional, wilfully negligent, or done with conscious indifference or reckless disregard for the safety of others."[111] Moreover, the legislative history of Chapter 84 indicates that the chapter's supporters emphasized these limitations.[112]

These statutory protections demonstrate that any application of veil piercing to nonprofit corporations must be narrowly tailored not to expose

[107] TEX. CIV. PRAC. & REM. CODE § 84.002(7). Although a nonprofit corporation is not necessarily a "charitable organization," Chapter 84 broadly defines a "charitable organization" to include, among other groups:

> [A]ny organization exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 by being listed as an exempt organization in Section 501(c)(3) or 501(c)(4) of the code, if it is a corporation, foundation, community chest, church, or fund organized and operated exclusively for charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, fire protection or prevention, emergency medical or hazardous material response services, or educational purposes.

Id. § 84.003(1)(A).

[108] *See* H. Rsch. Org., Bill Analysis, Tex. S.B. 202, 70th Leg., R.S. (1987) ("Unfortunately, volunteers rightly perceive that they may well be taking on personal liability risks that they can ill afford as a result of their free service to charitable organizations.").

[109] *See* TEX. CIV. PRAC. & REM. CODE §§ 84.004–.005.

[110] *See, e.g.*, *id.* §§ 84.004(d)–(e), .0061(e), .0066(c), .007.

[111] *Id.* § 84.007(a).

[112] The House Research Organization's bill analysis explained:

> This bill would set reasonable caps on liability of volunteers, officers, directors and employees of charitable organizations. The public need have no worries that this bill would protect child molesters or drunk charity car poolers. The bill clearly states that it would not apply to deliberate or recklessly negligent actions.

H. Rsch. Org., Bill Analysis, Tex. S.B. 202, 70th Leg., R.S. (1987).

the employees and volunteers of charitable organizations to excessive liabilities. However, the limitations on these protections create a space for veil piercing to apply.

B. Veil Piercing Would Lessen the Need for the Texas Attorney General to Intervene Against a Nonprofit Corporation in an Ultra Vires Action

In Texas, the attorney general may bring suit against a nonprofit corporation for an act or transfer beyond the scope of the nonprofit corporation's expressed purpose or purposes.[113] The attorney general can seek to "terminate the [nonprofit] corporation; enjoin the [nonprofit] corporation from performing an unauthorized act; or enforce divestment of real property acquired or held contrary to the laws of [Texas]."[114]

However, the attorney general is unlikely to bring ultra vires actions against nonprofit corporations, except in particularly egregious situations. A state's attorney general typically has limited resources to monitor and potentially bring action against a large number of nonprofit organizations.[115] Over half of the states' attorney general offices are staffed with "only three or fewer full-time equivalent staff overseeing all the nonprofits in their state."[116] Even if Texas possessed a relatively large full-time staff to monitor nonprofits, the State still possesses a limited number of resources to monitor over 170,000 nonprofit organizations.[117] Thus, a nonprofit corporation's improper activities must rise to a particularly high level of mismanagement to face intervention by the Texas Attorney General.[118]

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[113] TEX. BUS. ORGS. CODE § 20.002(c)(3).

[114] *Id.*

[115] Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1522–25 (2021); Matthew D. Caudill, *Piercing the Corporate Veil of a New York Not-For-Profit Corporation*, 8 FORDHAM J. CORP. & FIN. L. 449, 485 n.236 (2003) ("The remedy [of nonprofit veil piercing] also serves the intermediate situation that is not so egregious so as to involve action from the AG, but which conduct is noticeable by persons affiliated with such not-for-profit corporation.").

[116] Molk & Sokol, *supra* note 115, at 1522. Texas does not publicly list the number of full-time staff overseeing nonprofit operations.

[117] *See* CORPS. SECTION, OFF. OF THE SEC'Y OF STATE, *supra* note 3.

[118] The inability of New York's limited staff of seventeen attorneys and six accountants supports this conclusion. *See* Caudill, *supra* note 115, at 482 nn.208–09. This staff struggled to monitor around 40,000 entities, less than a quarter of Texas's over 165,000 nonprofit corporations. *See id.* at 485 n.236.

Veil piercing of nonprofit corporations would provide an additional check on nonprofit corporations to prevent mismanagement. In particular, this approach would serve "the intermediate situation that is not so egregious so as to involve action from the [Texas Attorney General], but which conduct is noticeable by persons affiliated with such [nonprofit] corporation."[119]

C. The Texas Uniform Fraudulent Transfer Act Complements the Veil Piercing of a Nonprofit Corporation.

The Texas Uniform Fraudulent Transfer Act does not conflict with veil piercing but rather supplements the doctrine to prevent inequitable results. The Act provides an additional means to establish "actual fraud" in support of veil piercing.

The Texas Uniform Fraudulent Transfer Act prevents debtors from defrauding creditors by placing assets beyond their reach.[120] The Act provides "a comprehensive statutory scheme through which a creditor may seek recourse for a fraudulent transfer of assets or property."[121] Additionally, the Act broadly defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."[122] Outside of preferential transfers to insiders, a fraudulent transfer occurs when the debtor makes the transfer "without receiving a reasonably equivalent value in exchange," or with "actual intent to hinder, delay, or defraud" a creditor.[123] For example, Section 24.005(a) of the Uniform Fraudulent Transfer Act declares the following:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose

[119] *Id.* at 485 n.236.

[120] *In re* 3 Star Props., LLC, 6 F.4th 595, 608 (5th Cir. 2021); Challenger Gaming Sols., Inc. v. Earp, 402 S.W.3d 290, 293 (Tex. App.—Dallas 2013, no pet.).

[121] *Challenger Gaming Sols., Inc.*, 402 S.W.3d at 293. The Act broadly defines the terms "creditor" and "debtor." A "debtor" means "an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity" that is liable on a claim and includes a nonprofit corporation. *See* TEX. BUS. & COM. CODE § 24.002(6), (9). A "creditor" means "a person . . . who has a claim" and includes an individual who has a claim against a nonprofit corporation. *See id.* § 24.002(4).

[122] TEX. BUS. & COM. CODE § 24.002(12).

[123] *Id.* §§ 24.005–.006.

> before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.[124]

The fundamental remedy for a "creditor who establishes a fraudulent transfer is recovery of the property from the person to whom it has been transferred."[125] For example, a court may order "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim" among other remedies.[126] If the transfer or obligation—or a subsequent transfer or obligation—is with a person who takes the asset "in good faith and for reasonably equivalent value," the transfer or obligation is not voidable.[127] However, a creditor may still recover from the "person for whose benefit the transfer was made" for the lesser of the value of the asset transferred or the amount necessary to satisfy the creditor's claim.[128]

Courts in Texas have held that a fraudulent transfer under Section 24.005(a)(1) of the Texas Uniform Fraudulent Transfer Act is sufficient to constitute "actual fraud" to support veil piercing.[129] Section 24.005(a)(1) states that a fraudulent transfer occurs when a debtor makes the transfer "with actual intent to hinder, delay, or defraud any creditor."[130] In *Ritz*, the appellant, Ritz, "drained Chrysalis of assets it could have used to pay its debts to creditors like Husky by transferring large sums of Chrysalis' funds to other entities Ritz controlled."[131] The bankruptcy court below, however, failed to draw any inference that the transfers were made "with actual intent to hinder, delay, or defraud any creditor."[132] The Fifth Circuit held that when a transfer is fraudulent "under the actual fraud prong of TUFTA[, that] is sufficient to satisfy the actual fraud requirement of veil-piercing."[133] However, the Fifth

[124] *Id.* § 24.005(a).

[125] *Challenger Gaming Sols., Inc.*, 402 S.W.3d at 294; TEX. BUS. & COM. CODE § 24.008.

[126] TEX. BUS. & COM. CODE § 24.008(a)(1).

[127] *Id.* § 24.009(a).

[128] *Id.* § 24.009(b).

[129] *In re* Ritz, 832 F.3d 560, 566–67 (5th Cir. 2016).

[130] TEX. BUS. & COM. CODE § 24.005(a)(1).

[131] 832 F.3d at 563.

[132] *Id.* at 568–69. The Fifth Circuit ultimately remanded the case for the bankruptcy court to determine if such an actual fraud existed, even though the factual findings were consistent with such an inference. *Id.* at 569.

[133] *Id.* at 567–68.

Circuit also held that a trial court must nonetheless find that the actual fraud was for the debtor's direct personal benefit to satisfy Section 21.223(b).[134]

D. Texas Would Not Break New Ground by Applying Veil Piercing to Nonprofit Corporations but Rather Would Follow the Example of Other Jurisdictions

Although courts infrequently apply veil piercing to nonprofit organizations, at least six jurisdictions have held that veil piercing may apply to nonprofit corporations. These examples show that applying veil piercing to nonprofit corporations would not thrust Texas into uncharted legal territory.

First, the Supreme Court of Colorado, in an en banc decision, found that veil piercing applies to nonprofit corporations.[135] The court stated that "members of a nonprofit corporation may become personally liable for the debt of the corporation to the extent the alter ego doctrine applies . . . to the corporation."[136] However, the court determined that the member of the nonprofit corporation did not treat the entity as his alter ego, without significant explanation.[137]

Second, the Supreme Court of Connecticut applied veil piercing to a nonprofit corporation.[138] The court held that veil piercing looks to the substance of the organization, rather than the statutory form of the entity, even if it is a nonprofit corporation.[139] Thus, the court pierced a nonprofit corporation's veil to hold that another nonprofit corporation was bound by an injunction order, even though the second nonprofit corporation was not a party to the injunction proceedings.[140]

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[134] *Id.* at 569.

[135] Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 866–68 (Colo. 2004) (en banc).

[136] *Id.* at 867. The court further noted that "the alter ego doctrine applies to all corporations, including nonprofit corporations." *Id.* at 867 n.7.

[137] *See id.* at 867.

[138] DeMartino v. Monroe Little League, Inc., 471 A.2d 638, 640–41 (Conn. 1984).

[139] *Id.* at 641 n.6.

[140] *Id.* at 641. The court applied the standard that "[w]here there is a near identity between corporations, their separate existences can be disregarded in order to prevent injustice to a third party." *Id.* Following an injunction restricting Monroe Little League, Inc.'s ability to conduct little league baseball games, the officers and some of the directors of Monroe Little League, Inc. created Little League Baseball of Monroe, Inc. to bypass the injunction's terms. *Id.* at 639. The Supreme Court of Connecticut affirmed the lower court's finding that Little League Baseball of Monroe, Inc. was in contempt of the injunction even though it was not a party to the injunction proceeding

Third, the First District Court of Appeal of Florida held that a trial court improperly granted a motion for summary judgment on the grounds that veil piercing may not apply to a nonprofit corporation.[141] Although no on-point Florida case law existed, the court held that "[b]asic corporation law . . . is that non-profit corporations are not exempt from these doctrines" of piercing the corporate veil and the related alter ego theory.[142] Thus, the court held that reverse veil piercing applied to a nonprofit corporation in the context of the equitable distribution of marital assets.[143]

Fourth, the Eighth Circuit Court of Appeals made an *Erie* guess of Iowa law that veil piercing may apply to an Iowa nonprofit corporation.[144] First, the court ruled that Iowa Code section 504A.101 did not preclude the common law application of veil piercing to a nonprofit corporation.[145] Additionally, the court held that existing Iowa precedent logically extended to allow the application of veil piercing to nonprofit corporations based on the veil piercing grounds of undercapitalization and the failure to follow corporate formalities.[146] Subsequently, the court found that the evidence sufficiently supported a finding of veil piercing to nonprofit corporations based on the two grounds.[147]

Fifth, the Second District Appellate Court of Illinois held that an entity's status as a nonprofit corporation does not bar a court from applying the equitable remedy of piercing the corporate veil.[148] As previously discussed, the court noted that a person subject to liability due to veil piercing of a nonprofit corporation must solely exercise "ownership control" rather than meeting the technical requirement of ownership.[149] Subsequently, the court

because the two nonprofit corporations were in "'near identity' with each other and that their corporateness, singly or jointly, served to work injustice on the plaintiffs and was designed to subvert the injunction." *Id.* at 641.

[141] Barineau v. Barineau, 662 So. 2d 1008, 1008–09 (Fla. Dist. Ct. App. 1995).

[142] *Id.* at 1009.

[143] *Id.* at 1008–09.

[144] *See* HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927, 936–40 (8th Cir. 2007).

[145] *Id.* at 937. Iowa Code section 504A.101 has since been superseded by Iowa Code sections 504.613 and 504.901. *See* IOWA CODE § 504A.101 (2003), *repealed by* Revised Iowa Nonprofit Corporation Act, (80 G.A.) ch. 1049, § 190 (effective July 1, 2005).

[146] *HOK Sport, Inc.*, 495 F.3d at 938–40.

[147] *Id.* at 940–42.

[148] Macaluso v. Jenkins, 420 N.E.2d 251, 255 (Ill. App. Ct. 1981).

[149] *See id.*; *see also supra* Introduction.

held that sufficient evidence existed to affirm the jury's verdict that a defendant was the alter ego of a nonprofit corporation.[150]

Sixth, the Supreme Court of Nebraska held that "a corporation's status as a nonprofit corporation in and of itself does not bar a court from finding the corporation to be the alter ego of an individual and from applying the equitable remedy of piercing the corporate veil."[151] The court reasoned that for-profit and nonprofit corporations should receive similar legal treatment because of the blurring between the substance of the two types of entities, such as a nonprofit corporation's ability to engage in significant commercial activity.[152] Thus, the court allowed the application of reverse veil piercing upon a nonprofit corporation in a dissolution (of marriage) proceeding.[153]

These extra-jurisdictional cases demonstrate that the veil piercing of nonprofit corporations has existed in other jurisdictions for decades. However, Texas must look to its unique standards and history of veil piercing to determine the specific manner in which it should apply to nonprofit corporations.

IV. IF TEXAS COURTS APPLY VEIL PIERCING TO NONPROFIT CORPORATIONS, THE LIMITATIONS FROM LIMITED LIABILITY COMPANIES AND FOR-PROFIT CORPORATIONS SHOULD APPLY

In determining how to apply veil piercing to nonprofit corporations, Texas courts should consider goals "advanced by the State's provision of limited liability, such as encouraging investment, entrepreneurship, and economic growth."[154] In particular, Texas courts should defer to the Legislature's policy judgments.[155] However, the courts must be careful to temper the application of veil piercing of a nonprofit corporation due to the unique nature of the entity.

[150] *Macaluso*, 420 N.E.2d at 255–57.

[151] Medlock v. Medlock, 642 N.W.2d 113, 128 (Neb. 2002).

[152] *Id.* at 126–27.

[153] *Id.* at 127–28.

[154] Shook v. Walden, 368 S.W.3d 604, 619 (Tex. App.—Austin 2012, pet. denied).

[155] *Id.* at 620–21.

A. Out of Deference to the Texas Legislature, Texas Courts Should Apply the Corporate Veil Piercing Standards to Nonprofit Corporations for Matters Relating to or Arising Out of Contractual Obligations

Legislative policy judgments and balancing of interests must inform the application of equitable principles.[156] In *Cavnar v. Quality Control Parking, Inc.*, the Supreme Court of Texas adopted an approach to extend equitable statutory standards to situations that the statute did not reach.[157] The Supreme Court of Texas's decision in *Cavnar* established new rules regarding the awarding, accrual, and compounding of prejudgment interest.[158] Within two years of *Cavnar*, the Texas Legislature passed a statute limiting equitable prejudgment interest.[159] However, these statutory changes only applied in wrongful death, personal injury, and property damage cases.[160]

In *Johnson v. Higgins of Texas, Inc.*, the Supreme Court of Texas extended the statutory computation and accrual rules for prejudgment interest to other contexts than wrongful death, personal injury, and property damage out of deference to the Texas Legislature's policy judgments.[161] The court recognized that extending the statutory scheme would promote the policy goals underlying the *Cavnar* decision.[162] Additionally, the court also recognized that extending the statutory changes to another context would

[156] *See id.* at 620.

[157] *Id.* at 620 (citing Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551–54 (Tex. 1985), *superseded by statute,* Act of June 16, 1987, 70th Leg., 1st C.S., ch. 3, § 1, sec. 6, 1987 Tex. Gen. Laws 51 (repealed 1997), *as recognized in* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 529 (Tex. 1998)).

[158] 696 S.W.2d at 551–54. The Supreme Court of Texas decided that the prevailing plaintiff may recover prejudgment interest, compounded daily on damages that accrued by the time of judgment. The starting date for accrual of prejudgment interest on claims governed by Cavnar was six months after the occurrence of the incident giving rise to the cause of action, and the rate of interest was to be computed on the date of judgment. *Id.* at 555; *Johnson*, 962 S.W.2d at 529.

[159] *See* Act of June 16, 1987, 1987 Tex. Gen. Laws at 51–52. The statute modified equitable prejudgment interest, such as mandating that accrual begin on the earlier of (1) 180 days after the date the defendant receives written notice of a claim or (2) the day the suit is filed, that interest be calculated as simple interest, and various other changes. *Id.* § 6(a), (g); *Johnson*, 962 S.W.2d at 529.

[160] *Johnson*, 962 S.W.2d at 530.

[161] *Id.* at 532–33.

[162] *Id.* at 532 ("For example, the accrual rule of [S]ection 6 effectively encourages settlements without creating incentives for plaintiffs to delay.").

"conform[] the common law to legislative policy," which "serves the important goal of restoring uniformity to the law."[163]

In *Shook v. Walden*, the Austin Court of Appeals applied this logic to extend the limitations on veil piercing in the context of for-profit corporations to limited liability companies before Section 101.002 of the Code became effective.[164] The primary issue in *Shook* was whether a court could disregard a limited liability company's separate existence to impose direct liability on the entity's sole member for a breach of contract.[165] The court then analyzed the history of veil piercing in Texas, focusing particularly on the history related to limited liability companies.[166] The court concluded that when the Supreme Court of Texas decided *Castleberry*, the Texas Legislature had not yet expressed its views on veil piercing.[167] However, the Texas Legislature subsequently expressed its views with the 1989 amendments to Article 2.21 of the Texas Business Corporation Act.[168] These changes reflected a legislative desire to undo *Castleberry* and restore the prior distinction between veil piercing in a tort theory of recovery versus a suit in breach of contract.[169]

The Austin Court of Appeals framed the issue of how to apply veil piercing to a limited liability company as follows: "[W]hen should the policies of shielding investors and entrepreneurs from liability yield to the goal of preventing 'abuse' of the entity's separate existence?"[170] Between *Castleberry* and the Texas Legislature's more recent policy judgment to limit the bounds of veil piercing, the *Shook* court decided to defer to the legislature's guidance "in determining equity with respect to veil-piercing claims against LLCs."[171] Therefore, the court extended the limitations on for-

[163] *Id.* at 533. The court noted that the statutory changes applied "one rule to personal injury, wrongful death, and property damage cases," while *Cavnar* applied another rule only to cases not involving "personal injury, wrongful death, and property damage." *Id.* Such a result was "as illogical as it is arbitrary." *Id.*

[164] 368 S.W.3d 604, 614 (Tex. App.—Austin 2012, pet. denied); Act of Apr. 20, 2011, 82d Leg., R.S., ch. 25, § 2, 2011 Tex. Gen. Laws 45, 45 ("This Act takes effect September 1, 2011.").

[165] 368 S.W.3d at 607.

[166] *Id.* at 611–15.

[167] *Id.* at 620.

[168] *Id.*

[169] *Id.*; *see supra* Section III.A.

[170] *Shook*, 368 S.W.3d at 621.

[171] *Id.*

profit corporations in disregarding the corporate veil of a limited liability company.[172]

As discussed, the greatest difference between a nonprofit corporation and a for-profit corporation or a limited liability company is the nonprofit corporation's charitable purpose and general inability to distribute profits.[173] The Texas Legislature recognizes that "robust, active, bona fide, and well-supported charitable organizations are needed within Texas to perform essential and needed services" and a need exists to "reduce the liability exposure . . . of these organizations and their employees and volunteers."[174] Therefore, any application of veil piercing to a nonprofit corporation must overcome a high hurdle in light of these policy considerations.

By analogy, Texas courts should similarly extend the veil piercing standards for for-profit corporations and limited liability companies to nonprofit corporations for matters relating to or arising out of contractual obligations. The Texas Legislature has now twice expressed its view on limitations on veil piercing.[175] This pronouncement is even stronger than the Legislature's policy judgment on prejudgment interest because the Legislature has repeatedly and systematically responded to unbridled applications of veil piercing with the same set of limitations.[176]

Veil piercing in matters relating to or arising out of contractual obligations must involve a governing person using the nonprofit "corporation . . . for the purpose of perpetrating and [the governing person must] perpetrate an actual fraud on the obligee primarily for the direct personal benefit of" the governing person.[177] Such a situation must involve the infringing governing person's "dishonesty of purpose or intent to deceive" and is "characterized by deliberately misleading conduct."[178] In this

[172] *Id.*

[173] *See supra* Section III.A.

[174] TEX. CIV. PRAC. & REM. CODE § 84.002(1), (7).

[175] *See* TEX. BUS. ORGS. CODE §§ 21.223, 101.002.

[176] See *supra* Sections II.A–B for discussion of the Texas Legislature's response to the broad application of veil piercing to for-profit corporations and limited liability companies. See *infra* Section IV.0 for discussion of veil piercing under Chapter 84 of the Texas Civil Practice and Remedies Code. *See* Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 551–54 (Tex. 1985); *see also* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 529 (Tex. 1998).

[177] TEX. BUS. ORGS. CODE §§ 21.223(b), 101.002.

[178] *See* Belliveau v. Barco, Inc., 987 F.3d 122, 129 (5th Cir. 2021) (first quoting *In re* Ritz, 832 F.3d 560, 566–67 (5th Cir. 2016); and then quoting Shook v. Walden, 368 S.W.3d 604, 620 (Tex. App.—Austin 2012, no pet.)).

context, the nonprofit corporation would cease to act as a "bona fide . . . charitable organization[]"[179] as the entity must be used to perpetrate "an actual fraud" for the infringing governing person's "direct personal benefit."[180] To shield such abuse would extend beyond "reduc[ing] the [governing person's] liability exposure" and constitute absolute protection.[181] Therefore, courts should apply this restricted form of veil piercing to nonprofit corporations in matters relating to or arising out of contractual obligations.

However, Texas courts should hesitate to apply veil piercing without restrictions to nonprofit corporations in the case of a pure tort claim under the constructive fraud standard.[182] Veil piercing based on the constructive fraud standard would defeat any attempt to "reduce the liability exposure" of a nonprofit corporation's governing persons because of the standard's unpredictability.[183] Despite the distinction between veil piercing in cases relating to or arising out of contractual obligations and cases of pure tort claims, maintaining this distinction with a nonprofit corporation would frustrate the entity's charitable function.[184]

B. Interactions Between the Veil Piercing of a Texas Nonprofit Corporation and Chapter 84 of the Texas Civil Practice and Remedies Code

As previously discussed, Chapter 84 of the Texas Civil Practice and Remedies Code provides immunity and protection from liability to volunteers and employees of charitable organizations.[185] With some exceptions, Chapter 84 provides that a volunteer of a charitable organization "is immune from civil liability for any act or omission resulting in death,

[179] TEX. CIV. PRAC. & REM. CODE § 84.002(1).

[180] TEX. BUS. ORGS. CODE §§ 21.223(b), 101.002.

[181] TEX. CIV. PRAC. & REM. CODE § 84.002(7).

[182] Texas courts retain the constructive fraud standard from *Castleberry v. Branscum* in pure tort claims. *See* Ledford v. Keen, 9 F.4th 335, 339 n.5 (5th Cir. 2021); Farr v. Sun World Sav. Ass'n, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ); TecLogistics, Inc. v. Dresser-Rand Grp., 527 S.W.3d 589, 597 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

[183] *See supra* Section III.A; TEX. CIV. PRAC. & REM. CODE § 84.002(7). An unpredictable standard to impose liability on a nonprofit corporation's governing persons based on the vague breach of some legal or equitable duty would threaten existing legal protections of the governing persons of a nonprofit corporation.

[184] *See Shook*, 368 S.W.3d at 620.

[185] TEX. CIV. PRAC. & REM. CODE §§ 84.001, .004–.005.

damage, or injury if the volunteer was acting in the course and scope of the volunteer's duties or functions, including as an officer, director, or trustee within the organization."[186] Additionally, Chapter 84 limits the money damages of an employee of a charitable organization to "a maximum amount of $500,000 for each person and $1,000,000 for each single occurrence of bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property."[187]

However, Chapter 84 is inapplicable when a governing person uses the nonprofit "corporation . . . for the purpose of perpetrating and [the governing person] perpetrate[s] an actual fraud on the obligee primarily for the direct personal benefit of" the governing person.[188] The entirety of Chapter 84 is inapplicable to "an act or omission that is intentional, wilfully negligent, or done with conscious indifference or reckless disregard for the safety of others."[189] This exemption includes any instance of "actual fraud," which must involve "dishonesty of purpose or intent to deceive."[190] "Dishonesty of purpose" inherently requires deceit and constitutes an "act or omission that is intentional."[191] Additionally, an "intent to deceive" in the commission of actual fraud by its own terms requires an "act or omission that is intentional."[192] Therefore, the high hurdle of actual fraud will always make Chapter 84 irrelevant to veil piercing a nonprofit corporation in the case of matters relating to or arising out of contractual obligations.

Although Chapter 84 is irrelevant to actual fraud, veil piercing in pure tort situations may still implicate Chapter 84. As previously discussed, Chapter 84 generally provides volunteers of charitable organizations with broad immunity from civil actions.[193] To allow veil piercing under the

[186] *Id.* § 84.004(a).

[187] *Id.* § 84.005.

[188] *See* TEX. BUS. ORGS. CODE §§ 21.223(b), 101.002.

[189] TEX. CIV. PRAC. & REM. CODE § 84.007(a).

[190] *See* Belliveau v. Barco, Inc., 987 F.3d 122, 129 (5th Cir. 2021) (quoting *In re* Ritz, 832 F.3d 560, 566–67 (5th Cir. 2016)).

[191] *Black's Law Dictionary* defines "dishonesty" as "behavior that deceives or cheats." *Dishonesty*, BLACK'S LAW DICTIONARY (11th ed. 2019). A behavior that deceives must involve an intent to cause reliance or an intentional act. *See Deceit*, BLACK'S LAW DICTIONARY (11th ed. 2019). A behavior that cheats must involve an action to defraud or to practice deception, which both require intent. *See Cheat*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Defraud*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Deception*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[192] *See Deceit*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[193] TEX. CIV. PRAC. & REM. CODE § 84.004(a).

constructive fraud standard would create unpredictability and challenge the purpose of Chapter 84 to "reduce the liability exposure . . . of these organizations and their . . . volunteers."[194]Thus, the constructive fraud standard would also challenge Texas public policy by threatening to expose the controlling persons of nonprofit corporations to personal liability for the "breach of some legal or equitable duty . . . irrespective of moral guilt."[195] Although no authority exists to resolve this potential conflict, Texas courts or the Legislature must create an appropriate standard to avoid exposing the governing persons of nonprofit corporations to excessive liability in pure tort situations.

CONCLUSION

Contrary to dicta in *Ledford v. Kosse Roping Club*, the Texas Legislature never codified veil piercing. Rather the Legislature placed statutory limits on it for for-profit corporations and limited liability companies.[196] Thus, the Legislature has expressed a policy judgment on veil piercing rather than precluding the application of the doctrine on nonprofit corporations.

If Texas courts extend veil piercing to nonprofit corporations, its application must account for the entity's distinctive nature. All previous examples of veil piercing in Texas have occurred in a traditional business setting, but the potential for abuse remains in the charitable setting. Therefore, courts must balance allowing veil piercing to prevent abuse of limited liability and protecting people who devote their time and resources to charitable causes. The limitation in matters relating to or arising out of contractual obligations to only allow veil piercing when a governing person uses the nonprofit "corporation . . . for the purpose of perpetrating and [the governing person] perpetrate[s] an actual fraud on the obligee primarily for the direct personal benefit of" the governing person strikes this balance.[197] However, the constructive fraud standard in pure tort cases would result in unacceptable consequences of unpredictable liability exposure.

[194] *See id.* § 84.002(7).

[195] Castleberry v. Branscum, 721 S.W.2d 270, 273 (Tex. 1986) (quoting Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964)), *superseded by statute*, Act of May 12, 1989, 71st Leg., R.S., ch. 217, § 1, 1989 Tex. Gen. Laws 974 (amended 1993, 1997) (expired Jan. 1, 2010).

[196] *See* TEX. BUS. ORGS. CODE §§ 21.223, 101.002.

[197] *See id.* §§ 21.223(b), 101.002.